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In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-775

ROBERT P. MARCHAND, JR.,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Robert P. Marchand, Jr., petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit entered in this case on August 22, 1977, and November 1, 1977.

Opinions Below.

The Court of Appeals for the Second Circuit issued two opinions in this case. The initial opinion of August 22, 1977, not yet reported, is reproduced in the Appendix at pp. 21a-56a. The opinion of November 1, 1977, not yet reported, denying Marchand's petition for rehearing, is reproduced in the Appendix at pp. 57a-59a. The District Court for the District of Vermont issued findings of fact and conclusions of law in denying petitioner's motion to suppress. A copy of that opinion is reproduced in the Appendix at pp. 1a-20a.

Jurisdiction.

The original judgment of the Court of Appeals was entered on August 22, 1977 (App. 21a). A timely petition for rehearing was denied on November 1, 1977 (App. 57a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented.

When law enforcement officers effect a warrantless arrest subsequent to an illegal search and seizure in which they obtain evidence supporting a finding of probable cause to arrest, must they, to validate the arrest, affirmatively demonstrate reliance in fact on a totally independent and untainted source of evidence, or may they rely on the mere existence of an independent, untainted source of evidence which could theoretically have led to the arrest?

Constitutional Provision Involved.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case.

On August 24, 1976, federal agents and Florida police, armed with an arrest warrant for one Robert Higgins (not involved in this case), executed that warrant at Higgins' Lauderhill, Florida, apartment (App. 60a-61a). Petitioner emerged from a second bedroom shortly after the officers effected Higgins' arrest. None of the officers indicated in any way that they recognized petitioner at that time (App. 61a, 65a). While the federal agent in charge, Agent Harris of the DEA, was with Higgins in his bedroom, Detective Adcock of the Lauderhill police came to him, with Marchand's driver's license in hand, and stated that she had seen a picture of this person before,[1] recognized the name and the picture, and, from prior discussions with a Vermont DEA agent, believed that Marchand was wanted in that district on a marijuana conspiracy indictment. After calling Vermont to

[1] The photograph Adcock had seen was a small photograph marred by glare and depicting petitioner at a somewhat earlier age (App. 26a).

confirm Marchand's identity, Harris placed him under arrest, searched his wallet, and extracted a note which was introduced against him at trial (App. 62a-63a).

Prior to trial, Marchand moved to suppress the note, alleging that his license had been unlawfully seized from his wallet while it was lying on the dining room table; that his arrest was a direct result of this seizure; that since the note had been seized incident to his arrest both his arrest and the note seized pursuant to it were fatally tainted by the prior, illegal seizure of his license.

Agent Harris was the only officer involved in the arrest to testify at the suppression hearing. He testified in effect that he did not know the basis of Adcock's indentification of Marchand; it could have been based on the license, the photograph she had seen earlier, or some combination of the two.[2]

The trial court found that Detective Adcock initially identified Marchand by removing his driver's license from his wallet (App. 14a).[3] However, since the court found that initial seizure to be constitutionally permissible,[4] it found the arrest lawful and declined to suppress the note. Following a jury trial (in which the note was introduced against him) Marchand was convicted on one count of possession and distribution of marijuana in violation of 18 U.S.C. § 841.

[2]In responding to counsel's questions as to the basis for Adcock's identification of Marchand, Harris testified:

> I don't know if she did it completely on the driver's license, or, well, she stated she had seen a picture of this person before and she recognized the name and the picture and whatever and she knew it was Robert MARCHAND, the one that [the Vermont agent] had referred to earlier.
>
> . . . . . .
>
> I would assume from the driver's license that obviously had given the driver's license or had been taken, one way or the other. I don't know which way. And was identical, was identified. That's the normal procedure to identify the persons any how. (App. 66a-67a.)

[3]The court also found that Detective Adcock recognized Marchand from having seen his picture and that she also recognized the name, apparently obtained from the license (App. 6a).

The United States Court of Appeals for the Second Circuit also rejected petitioner's Fourth Amendment claim. However, it did so on a different basis. The Court of Appeals agreed with petitioner that if the seizure of the note had been unlawful "a new trial would be required" (App. 35a), and it further agreed with petitioner's initial premise that the arresting officer improperly obtained his driver's license from the wallet lying on the dining room table, thereby learning certain information pertinent to petitioner's identity (App. 37a). However, the Court of Appeals found that the license had not been the sole predicate for the arrest,[5] and that because other information, available to the arresting officer and not derived from the driver's license, *could have* provided probable cause for the decision to arrest, the arrest was not unlawful (App. 36a-37a, 42a). Contending that the court had applied an erroneous standard of burden of proof of taint in a warrantless arrest situation, petitioner sought rehearing. In denying rehearing the court reaffirmed its analysis, holding that the existence of untainted evidence supporting a finding of probable cause, without any proof that the untainted evidence had *in fact* provided the sole basis for the arrest, was sufficient to overcome any claim of taint (App. 57a-59a).

[4]Given this conclusion, the court did not reach the burden-of-proof-of-taint issue raised in this petition.

[5]The Court of Appeals found that Adcock's conclusion that Marchand was a fugitive from Vermont "was based on previous telephone conversations with [a Vermont DEA agent], prior observations of a photograph that had been sent to Miami, *and* inspection of a driver's license she had extracted from a wallet lying on the apartment's dining room table" (App. 29a) (emphasis added).

Reasons why the Writ Should be Granted.

The Burden of Proof Standard Applied by the Court Below is Legally Incorrect and Logically Unsound.

In affirming the legality of petitioner's warrantless arrest on the basis of the existence of untainted evidence which could have provided probable cause for the decision to arrest, the Court of Appeals applied a standard of burden of proof of taint which, by its own acknowledgement, was guided by "no federal authority squarely on this [point]" (App. 37a-38a). Petitioner submits that this standard is flawed both legally and logically and seeks review of the constitutionality of its application in this Court.

It cannot be doubted that the Fourth Amendment protection against unreasonable searches and seizures includes a prohibition against the introduction of evidence tainted by prior illegal government actions whether that evidence be a direct or derivative result. As this Court stated in *Wong Sun* v. *United States*, 371 U.S. 471 (1963), where a claim of "taint" is made, the question is:

> whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint. 371 U.S. at 488.

Petitioner submits that, as a matter of law and policy, once an initial illegality has been shown, a finding of "exploitation," and, therefore, the suppression of resulting evidence, is required unless the government can meet the burden of affirmatively demonstrating, by at least a preponderance of the evidence, that it, *in fact*, relied upon an independent, untainted source to support its subsequent actions — and that the mere existence of an independent source upon which it theoretically could have relied is insufficient.

In relaxing the burden of proof by requiring that the government need show only that it had sufficient untainted information available so that hypothetically it might have uncovered the challenged evidence without its illegal actions, the Court of Appeals has eroded the protections of the Fourth Amendment. Where constitutional rights of paramount importance are involved, the government has not been, and cannot be, permitted to justify its actions solely on the tenuous basis of what might have been. For example, the existence of probable cause upon which a warrant might have been obtained has never been held, in and of itself, to be sufficient justification for dispensing with the requirement of a warrant. See, *e.g.*, *United States* v. *Chadwick*, 97 S. Ct. 2476 (1977). The court's departure from this standard is legally and logically unsound.

The Court of Appeals justified its relaxation of the government's burden of proof in this case by analogizing to the situation where a search has been conducted pursuant to a warrant. However, cases dealing with warrants involve factors substantially different than those found in a case such as this in which an arrest is made without a warrant — *i.e.*, solely on the basis of the field officer's unmonitored judgment. When an officer acts pursuant to a warrant issued on the basis of a prior judicial determination that the supporting affidavit demonstrated probable cause, and it is later claimed that the evidence must be suppressed because the affidavit contained illegally obtained information, factors inherent in the warrant

process enable the government to meet its burden of proof of reliance in fact without the presentation of additional evidence as to the thought processes of the officer who obtained the warrant. In submitting an affidavit prior to the issuance of the warrant, the officer sets down on paper precisely those bases upon which he is, *in fact*, relying. If one of these bases is later found to be illegal, the court can determine the validity of the officer's actions simply by excising the illegally obtained information from the warrant and making a new judicial determination as to the existence of probable cause on the basis of the remaining facts alone. If those remaining, legally obtained facts are sufficient to constitute probable cause, then they meet the government's burden of proof of actual reliance on an independent source. There is thus no need for further testimony from the officer; the inclusion of those facts in the initial application for a warrant, without more, demonstrates his actual reliance.

However, where, as here, an officer initiates an arrest or a search without the submission of an affidavit for a prior judicial determination of probable cause, and a claim that the action is tainted by illegally obtained information is later raised, the court cannot, as it can in the case of an affidavit-search warrant case — and as it improperly did here (App. 37a-38a) — simply disregard that illegally obtained information and conclude that since the legally obtained information "would have been" sufficient to establish probable cause, the government has met its burden of proving reliance on an independent source. The fatal flaw in so doing lies in the absence of any prior documentation of *actual reliance* on the legally obtained information by the officer operating in the field. Without an affidavit setting forth such reliance, the government must present sufficient evidence *at* the suppression hearing to enable the court to make a finding that the officer did, *in fact*, rely upon the independent source and not upon the illegally obtained information. Given these significant differences between the warrant situation and that presented here, the Court of Appeals' reliance in this case on language from warrant cases is plainly misplaced.

In its opinion denying rehearing the Court of Appeals attempts to distinguish this case from the "burden of proof laid down in the usual 'fruit of the poisonous tree' case" by limiting its applicability to situations where the independent source is obtained *subsequent* to the primary illegality (App. 58a).[6] Here, it asserts, "the sequence was the opposite" (*id*), since the independent source — *i.e.*, the previously seen photograph — arose prior to the illegal seizure of the license from the wallet. Petitioner submits that the "taint" cases cited by the Court of Appeals do not turn on whether the primary illegality occurred prior or subsequent to the acquisition of an alleged independent source; rather, the taint question hinges on the actual relationship between the primary illegality and the evidence sought to be suppressed as tainted. The question is, and to effectuate the guarantees of the Fourth Amendment must be, whether or not the primary illegality *in fact* affected the challenged search or arrest.

The error in the Court of Appeals' focus is illustrated by the conflicting decision of the Court of Appeals for the Sixth Circuit in *United States* v. *Griffin*, 502 F. 2d 959 (6th Cir. 1974), cert. den. 419 U.S. 1050 (1974). In *Griffin*, federal agents with legally obtained probable cause to search the defendant's apartment, dispatched an agent to procure a search warrant.

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[6] By its citation of cases such as *United States* v. *Ceccolini*, 542 F. 2d 136 (2d Cir. 1977), cert. granted, 45 U.S.L.W. 3715 (1977), the Court of Appeals apparently recognized that the usual burden requires the government to demonstrate affirmatively reliance in fact on an independent source to negate a claim of taint.

However, before the warrant was secured, other agents illegally entered the apartment and conducted a search. The evidence obtained during this search was ordered suppressed. In the absence of a demonstration of reliance in fact, the existence of an independent untainted source — the warrant — was insufficient to overcome the direct connection between the illegal entry and the evidence disclosed, even though the independent source existed prior to the primary illegality. Thus, the distinction drawn by the Court of Appeals here is clearly unsound.

The standard enunciated by the Court of Appeals, by permitting the government to rely on what it hypothetically could have done to justify otherwise tainted actions, can only lead to the abrogation of still-vital Fourth Amendment principles only recently reiterated by this Court — namely, that intrusion on an individual's liberty and privacy may be justified only on the basis of a detached, impartial judicial determination that the facts upon which the law enforcement officer actually relies in effecting the intrusion are facts which, in and of themselves, do justify the intrusion. See *United States* v. *Chadwick*, *supra*.[7] Post-hoc speculative rationalizations may be colored, even if only subconsciously, by the results of a search or arrest. What might have been, in fact might not have been. Unless proof of reliance in fact on an independent source — proof that what might have been, in fact was — is required, the individual rights and liberties guaranteed by the Fourth Amendment will be severely and unjustifiably undercut.

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[7]It should be noted that the government's failure to meet the requisite burden of proof of actual reliance on an independent source in this case is clear. The District Court's decision, read as a whole — and read most favorably to the government — lends equal support to a conclusion that the arrest was dependent on the illegal seizure of the license, as to a conclusion that the arrest was effected on the basis of the prior photograph (App. 6a, 14a). Nor does Agent Harris' testimony negate the inference of taint. He did not state that Adcock informed him that she had recognized Marchand solely or independently on the basis of the photograph she had seen earlier. Rather, he refers to the photograph only in conjunction with the license. The logical inference to be drawn from Harris' testimony is that the arrest was predicated on a *conjunction* of the information on the license and the earlier photograph. Furthermore, the sequence of events supports a finding of dependence on the license. Adcock did not walk in the door, recognize Marchand from her memory of the photograph (which was marred by glare and depicted Marchand at an earlier age (App. 26a n. 6)), announce her belief to Harris and then seek confirmation from the license. It was only *after* the seizure of the license that any recognition was announced (App. 6a, 28a-29a, 61a-62a, 66a-67a). Finally, despite the undeniably central nature of Adcock's testimony, the government failed to call her as a witness. Her unexplained absence can only give rise to an inference that her testimony would have been unfavorable to the government. See, *e.g. United States* v. *Mahone*, 537 F. 2d 922 (7th Cir. 1976), cert. den. 429 U.S. 1025 (1976). Given the totality of these factors, petitioner submits that the government cannot possibly be found to have met its burden of proving reliance in fact on an independent source — the photograph — and the arrest must be held to be tainted by the prior unlawful seizure of the license.

Conclusion.

The proper allocation of the burden of proof of taint in cases involving Fourth Amendment violations is an important and frequently recurring problem in the administration of criminal justice. The relaxed standard established in this case constitutes an unwarranted encroachment on the rights and liberties guaranteed by the Fourth Amendment. Accordingly, for all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA

v.

CRIMINAL ACTION
FILE NO. 76-51

ROBERT P. MARCHAND, JR.

Findings of Fact and Conclusions of Law.

The defendant, Robert P. Marchand, Jr. is charged with willfully and knowingly distributing and possessing with intent to distribute 180 pounds of marihuana, in violation of 21 U.S.C. § 841. The case is presently before the court on four defendant's motions: (1) to dismiss the indictment against him, (2) to suppress identification testimony, (3) to suppress evidence obtained at the time of his arrest on August 24, 1976, and (4) for the inspection of the minutes of grand jury proceedings.

An evidentiary hearing was conducted concerning the first three motions. Subsequent to the hearing of these motions the defendant renewed a prior motion for inspection of the minutes of all grand jury proceedings which had been previously denied. The renewed motion asserts that he is entitled to the minutes of the grand jury proceedings in order to establish his claim that the Government failed to present exculpatory information relating to the photographic identifications of him. He claims that inspection of the grand jury minutes is necessary in order to substantiate his

his belief that the proceedings were not conducted fairly and impartially.

Upon consideration of the testimony and arguments presented at the hearing and the memoranda filed by the parties, the court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Victor Roy, the first witness at the hearing, was arrested on July 18, 1975. He was subsequently charged in a federal indictment with distributing and conspiring to distribute marihuana. On the night of Roy's arrest he was taken to DEA headquarters in Williston, Vermont, where he was interviewed by Special Agent Theodore Handoga in the latter's office.

2. Roy testified that a tape recorder on Agent Handoga's desk was operating during the interview. He stated that he saw Handoga push buttons on the machine and saw the "wheels" turning. However, he was not certain that a recording was actually made.

3. Roy conceded that while the tape recorder was apparently operating he said nothing to Agent Handoga about the crime for which he had been arrested because his lawyer was not present. He subsequently pleaded guilty, sentence was suspended and Roy was placed on probation..

4. On July 1, 1976, at approximately 9:00 A.M., Roy appeared at the United States Attorney's office in Burlington in response to a grand jury subpoena. At about 10:00 A.M. he went to a small interview room, accompanied by Special Agent Handoga and Jerome F. O'Neill, Assistant United States Attorney. Roy claimed that he was not informed of his rights prior to being questioned by Assistant U.S. Attorney O'Neill and Agent Handoga. It appears that Mr. O'Neill was present only for brief periods, and then only to ask Roy questions which he said he would ask before the grand jury. Roy stated that on this occasion there was a tape recorder in the interview room, but did not indicate whether it was operating. The court finds that no recording was made.

5. During his conversation with Agent Handoga, Roy informed the Agent that he had received the marihuana from someone named "Bob" or "Big Foot."

6. At approximately 10:45 A.M. Agent Handoga showed Roy a series of 14 photographs (Defendant's Exhibits C-P) and asked Roy to pick out the photograph or photographs of anyone he recognized. Roy was given ample time to review the photographs and he studied each and every one. He first selected a photograph of someone he thought to be Jim Hathaway of Burlington, Vermont. He selected this photograph on his first and second viewings of the photographs. After each selection he was told that the photograph he recognized was not of Jim Hathaway.

7. Upon viewing the photographs a third time, Roy set aside Defendant's Exhibit C, a photograph of the defendant, stating "this picture looks funny." With this, Agent Handoga produced a larger photograph of the defendant, Defendant's Exhibit A, and added "OK, here's a Bob, what about this one?" Roy responded that the larger photo "looks similar." According to Roy's testimony, which was not disputed, Agent Handoga remarked "Ah, that's Marchand." He then called upon Roy to initial both photographs.

8. After Roy selected Exhibit A, Agent Handoga asked him to look for any other photographs of people he recognized. Roy selected the photograph of the only female in the group and told Agent Handoga that it looked like the

girl who was with "Bob" at one time. Roy made no further identifications despite what he termed Agent Handoga's eagerness that he do so.

9. The court finds that Roy made no positive identification of the defendant. His remark that the person pictured in Defendant's Exhibit A looked similar to the photo C, which was originally displayed to Roy, came only after the suggestion of the agent that the larger photo A was a picture of "a Bob."

10. Richard Wayne Perkins, the second witness at the hearing, was arrested on July 18, 1975, for marihuana-related offenses. He was interviewed by Special Agent Handoga on two or three occasions between the time of his arrest and his sentencing on March 29, 1976. On one or more of those occasions he gave Agent Handoga a description of the man who gave 180 pounds of marihuana to him and Victor Roy.

11. Perkins met with Agent Handoga, and the latter on April 26, 1976, showed him Defendant's Exhibits A-P and asked him to pick out the photographs of two people he felt most closely resembled the people he saw at the time of the marihuana transaction. Perkins selected three or four and at the hearing stated that he had picked Exhibit A (which was a photograph of the defendant) and Exhibits M and O. He was then asked to initial the two (Exhibits A and O) that bore the closest resemblance to people he saw on the date of the transaction.

12. A few months after his arrest, Perkins gave Handoga a description of the person who sold him the marihuana. Since Perkins has artistic ability, he was asked to make a drawing of the seller. The sketch was received in evidence (Defendant's Exhibit Q). Perkins gave the sketch to Handoga. Perkins did not see the sketch again until the hearing.

13. Perkins testified that he did not feel he was being encouraged or pressured by Agent Handoga to select the individual depicted in Exhibit A as the supplier of the marihuana. He conceded that he was not certain that the individual depicted was the supplier.

14. Special Agent James H. Harris of the DEA office in Miami, Florida, and the defendant testified as to the circumstances of the defendant's arrest in the Southern District of Florida on August 24, 1976. Pursuant to a federal arrest warrant issued for Robert Higgins on charges of sale and distribution of marihuana and conspiracy to import marihuana, Agent Harris went to Higgin's apartment in Lauderhill, Florida, accompanied by two Dade County Public Safety Detectives, Adcock and Sadler, and DEA Special Agent McGlassius. The apartment had been under surveillance. The group was joined by a uniformed Lauderhill police officer outside the apartment.

15. At approximately 7:30 A.M. the uniformed officer knocked on the door of the Higgins apartment; Higgins opened the door. He gave his name as "Hull," but Detective Adcock recognized him as the Robert Higgins for whom the warrant was issued. Agent Harris placed him under arrest. The arrest was made just inside the door of the apartment.

16. Agent Harris and the other law enforcement personnel went further inside the apartment. They did not have a search warrant for the apartment. Higgins informed them that another person, later identified as the defendant, was in one of the bedrooms. As the defendant, who apparently had been asleep, emerged from the bedroom wearing just a pair of pants, Agent Harris asked one or more of the officers to find out who he was and to make sure he was not armed. After this was accomplished, the defendant was permitted to return to his bedroom to put on

a shirt. The defendant was told that, although he was not under arrest, he could not leave the apartment. He was told to remain seated in a chair in the dining room.

17. While Agent Harris was talking to Higgins, Detective Adcock showed him the defendant's driver's license and stated that she knew Robert Marchand and had reason to believe that he was a fugitive from the District of Vermont on a marihuana conspiracy indictment. She had learned this from a prior telephone conversation with Special Agent Handoga of Vermont. She also had seen a photograph of the defendant prior to the visit to the apartment.

18. Exactly how Detective Adcock obtained the defendant's driver's license was not resolved at the hearing. Special Agent Harris testified that he assumed she had been given the license or had taken it when he requested that the defendant be identified and searched for weapons. The defendant testified that his wallet was on the dining room table. He was seated near the table until he left the room to dress. Detective Adcock recognized the defendant from having seen his photograph. She also recognized the defendant's name. She apparently obtained his name from his operator's license. The license was removed from the defendant's wallet and was presented to Agent Harris by Detective Adcock for identification. Nothing other than the driver's license was removed from the defendant's wallet until the time of his arrest and the search incident thereto.

19. Agent Harris verified the defendant's identity by calling Special Agent Handoga in Vermont. He then arrested the defendant and advised him of his rights. He also searched the defendant's person. Special Agent Harris removed the defendant's wallet from his rear pants pocket and obtained therefrom a small address book (Defendant's Exhibit R) and various papers and written notes (Defendant's Exhibit S).

20. Special Agent Harris searched through the address book and wallet, looking for contraband or other evidence. In addition to looking for drug-related evidence between the pages of the book and among the papers found in the wallet, Agent Harris looked at some of the writing in the book and on the papers. When the defendant asked to make some telephone calls, Special Agent Harris supplied him the numbers from the address book and the defendant wrote them down on a separate piece of paper and made the calls.

21. The defendant was handcuffed and taken away by the law enforcement personnel. Approximately one week after the arrest, Special Agent Harris sent the address book and papers to Special Agent Handoga in a sealed evidence envelope.

Conclusions of Law

I. *Motion to Dismiss Indictment*

The defendant's motion to dismiss the indictment is premised upon four grounds: first, that the Government abused the subpoena power of the grand jury in order to interrogate Victor Roy; second, that the Government failed to preserve and make available to the defendant tape recordings of Special Agent Handoga's interviews with Victor Roy; third, that the identifications of the defendant by Victor Roy and Richard Perkins were fatally tainted by overly suggestive photographic identification procedures; and fourth, that exculpatory evidence of the suggestive nature of the identifications of the defendant was not furnished to the grand jury.

In support of his argument that the Government improperly used a grand jury subpoena for the purpose of conducting an interview of Roy, the defendant places heavy reliance upon *Durbin* v. *United States*, 221 F.2d 520 (D.C. Cir. 1954), where it was held "[i]t was clearly an improper use of the District Court's process for the Assistant United States Attorney to issue a grand jury subpoena for the purpose of conducting his own inquisition." *Id.* at 522. The courts in this and other circuits are in general agreement with the holding in *Durbin*. The district court in *In re Stolar*, 397 F.Supp. 520, 522 (S.D. N.Y. 1975), relied on *Durbin* in holding that "the grand jury process may not be used by a federal prosecutor solely to conduct his own investigation." *See United States v. Del Toro*, 513 F.2d 656, 664 (2d Cir. 1975) (grand jury may not be used "for the sole purpose of preparing an already pending indictment for trial"); *United States v. Kleen Laundry & Cleaners, Inc.*, 381 F.Supp. 519, 523 (E.D. N.Y. 1974). The Third Circuit has held that "[t]he court will not enforce a grand jury subpoena used only to compel a witness to appear in the United States Attorney's office." *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85, 91 (3d Cir. 1973). The defendant also directs the court's attention to *United States v. Thomas*, 320 F.Supp. 527 (D.S.C. 1970), and *United States v. Gurney*, 393 F.Supp. 683 (M.D. Fla. 1974). In *Thomas*, the court held that it was an improper usurpation of judicial power for the United States Attorney to issue an official-looking document entitled "Summons" to notify the recipient to appear for an interview at the United States Attorney's office. In *Gurney* the court announced an end to its own practice of issuing writs of habeas corpus ad testificandum to bring incarcerated federal prisoners to the United States Attorney's office for the sole purpose of interviewing prospective government witnesses for pre-trial discovery. 393 F.Supp. at 685.

The cases referred to do not support the defendant's contention that the Government abused the grand jury's subpoena power in conducting the interview of Victor Roy prior to his grand jury appearance. In each of the cases relied upon by the defendant the purpose of the process issued was to assist the Federal prosecutor in the preparation of a case. None of the witnesses summoned in those cases appeared before the grand jury.

The present case presents different circumstances. Here, Victor Roy actually did appear before the grand jury on the date for which he was summoned. His interview with Assistant United States Attorney O'Neill and Special Agent Handoga was clearly relevant to the matters under investigation by the grand jury. The Assistant United States Attorney's questioning of Roy and Special Agent Handoga's conducting of the photographic identification do not constitute an abuse of the grand jury's subpoena power within the context of the cases relied upon by the defendant.

Victor Roy testified in support of the defendant's claim that a tape recording had been made of Special Agent Handoga's interview with Roy on July 18, 1975. As noted previously, Roy was not certain that a recording had been made. Even if a recording had been made, it is clear, by Roy's own concession, that he said nothing at all about the marihuana transaction because his lawyer was not present. The court finds it unnecessary to determine whether a recording was made, since even if one had been made, it would have contained nothing relevant to the present case.

In light of the court's finding that no recording was made of Roy's July 1, 1976, interview with Special Agent Handoga, and that any recording that might have been made of the July 18, 1975, interview would be irrelevant to the

present case, the court concludes that the defendant's claims, with respect to tape recordings, furnish no basis for dismissal of the indictment.

The third point raised by the defendant is that the photographic identification procedures used by Special Agent Handoga in his interviews with Victor Roy and Richard Perkins were unnecessarily suggestive and conducive to mistaken identification, thus resulting in a denial of due process. Questions concerning such identifications normally arise in the context of motions to suppress before trial, *see, e.g., United States v. Harrison*, 460 F.2d 270 (2d Cir.), *cert. denied*, 409 U.S. 862 (1972), or in the context of appeals or proceedings for post-conviction relief, *see, e.g., United States v. Magnotti*, 454 F.2d 1140 (2d Cir. 1972). The court is not aware of any case setting forth the standard to be applied where evidence of such identifications is presented to a grand jury. In the Second Circuit the test of admissibility at trial is whether the identifications resulted from "unnecessarily suggestive confrontation." *Brathwaite v. Manson*, 527 F.2d 363, 368 (2d Cir. 1975), *cert. granted*, 425 U.S. ____, 44 U.S.L.W. 3624 (May 3, 1976).

It appears that a less rigorous test than that articulated in *Brathwaite* should be applied to identification evidence presented to a grand jury. *Cf. United States v. Calandra*, 414 U.S. 338, 344-45 (1974). Although such identification as Roy made was suggestive, the court concludes that its presentation to the grand jury did not constitute a denial of due process.

The first question is whether the use of photographs, rather than some other method of identification, was unnecessarily suggestive in and of itself. In *United States ex. rel. Pella v. Reid*, 527 F.2d 380, 384 (2d Cir. 1975), the Second Circuit held that there was no impropriety in using photographic identification even where the suspect was

available for a line-up. Clearly where, as here, the suspect was not in custody or otherwise available for a line-up, the use of photograhic identification cannot be considered unnecessarily suggestive per se.

It is also clear that the lapse of time between the date on which Richard Perkins allegedly last saw the defendant and the date of the photographic identification is not in and of itself decisive. *See United States v. Hurt*, 476 F.2d 1164 (D.C. Cir. 1973) (lapse of approximately 1 year). Perkins apparently last saw the defendant approximately nine months before he was shown the display. In the interim he had drawn a good likeness of the defendant. In these circumstances a photographic display conducted after such an interval is not, of itself, impermissibly suggestive.

In attacking the Perkins identification, the defendant initially complains that the photographs in the display, with the exception of the two depicting the defendant, bore little resemblance to the sketch Perkins had made previously. The defendant asserts that "[a]lthough the sketch was of a clean-shaven individual with large features and short light-colored hair, most of the photographs in the array of approximately thirteen small and two large photographs depicted individuals with facial hair and/or long hair." The court disagrees with the defendant's characterization. The sketch is basically an outline drawing and reveals no attempt at skin or hair coloring. As for the hirsuteness of the individuals depicted in the photographs, only two photographs, Exhibits F and L, reveal full-fledged beards and mustaches; a third, Exhibit E, appears to show a mustache. One other photograph, Exhibit K, reveals a day or two's growth of whiskers. The individuals depicted in at least five photographs, Exhibits B, H, K, N and O, have relatively short hair. Finally, except for three color photographs, Exhibits

E, G and K, it is virtually impossible to determine the hair coloring of the subjects depicted in the array.

The defendant also complains that the use of two photographs of him, including the large photograph, placed "double emphasis" on him and was unnecessarily suggestive. This argument is without merit. In *United States v. Falange*, 426 F.2d 930 (2d Cir.), *cert. denied*, 400 U.S. 906 (1970), the defendants complained of a pre-trial photographic identification in which three of the sixteen photographs shown to the witness were of the same defendant. Because the photographs were taken at different times and at different angles, and because the photographic identification was corroborated by other evidence the court found no constitutional infirmity in the procedure. 426 F.2d at 935.

The fact that the large photograph of the defendant was one of only two large photographs shown to Perkins, is similarly without consequence. Characteristics peculiar to a *photograph* of an individual, rather than to the *individual* depicted therein, do not render the use of that photograph unnecessarily suggestive. *See United States v. Harrison*, 460 F.2d 270, 271 (2d Cir.), *cert. denied*, 409 U.S. 862 (1972); *United States v. Fernandez*, 456 F.2d 638, 641 (2d Cir. 1972); *United States v. Magnotti*, 454 F.2d 1140, 1141 (2d Cir. 1972). Neither the Supreme Court nor the Second Circuit has adopted the dissenting view expressed by Justice Brennan in *United States v. Ash*, 413 U.S. 300, 333 (1973), that repetition of a particular subject's photograph, or a photograph which stands out from the rest for reasons other than the characteristics of its subject, is highly likely to render an identification display unnecessarily suggestive. The court concludes that the photographic identification of the defendant by Richard Perkins was not unnecessarily suggestive.

The final point raised by the defendant on his motion to dismiss the indictment is that evidence of the suggestive nature of the Roy and Perkins identifications should have been presented to the grand jury. He asserts that presentation of the fact of the identifications without also presenting the circumstances surrounding the identifications detracted from the fairness and impartiality of the grand jury proceedings. Recently the Supreme Court held that

> the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, . . . or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination . . . .

United States v. Calandra, 414 U.S. 338, 344-45 (1974) (citations omitted). In the absence of a claim of improper motivation or other improper conduct on the part of the Government or the grand jury itself, *see, e.g., United States v. DeMarco*, 401 F.Supp. 505, 512-13 (C.D. Cal. 1975), the defendant's challenge to the indictment must fail.

II. *Motion to Suppress Identification Testimony*

As indicated in the above discussion of the defendant's motion to dismiss the indictment, the photographic identification of the defendant by Richard Perkins was not the result of "unnecessarily suggestive confrontation." *Brathwaite v. Manson*, 527 F.2d 363, 369 (2d Cir. 1975), *cert. granted*, 425 U.S. ____, 44 U.S.L.W. 3624 (May 3, 1976).

Accordingly, the motion to suppress Perkin's identification must fail. Since Roy's identification, such as it was, is infected by suggestion, the motion, as to this witness is granted.

III. *Motion to Suppress Evidence Obtained at Time of Arrest*

The defendant contends that the law enforcement personnel who participated in his arrest on August 24, 1976, had probable cause to arrest him only after learning his identity, and that they established his identity as a result of an illegal search and seizure. The focus of the present inquiry is on whether evidence of the defendant's identity was obtained pursuant to constitutionally valid procedures. Since the court has found that detective Adcock, or one of the other officers, initially identified the defendant by removing his driver's license from his wallet, the particular question at issue is whether, under the circumstances as they existed at the time, this procedure constituted a reasonable search or seizure under the Fourth Amendment to the United States Constitution.

Clearly, under the teaching of *Terry v. Ohio*, 392 U.S. 1 (1968), and *Adams v. Williams*, 407 U.S. 143 (1972), Special Agent Harris was justified in directing that a limited protective search of the defendant be made. Law enforcement officers who enter a dwelling place in order to execute an arrest warrant are entitled to take reasonable steps to ensure their safety while they are performing their duty. *Adams v. Williams*, *supra*, at 145-46. The validity of the search, insofar as it was for the purpose of determining whether the defendant was armed, is beyond question. *Terry v. Ohio*, *supra*, at 23-24.

The problem of requesting and obtaining identification is one which has received less attention from the courts. The Supreme Court held in *Terry* that "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Id.* at 22. More recently, in *Adams*, the Court noted:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

407 U.S. at 145-46.

In the instant case the procedures followed by the law enforcement personnel in determining the defendant's identity appear to fit within the framework of the type of "intermediate response" suggested by the Supreme Court in *Adams*. The officers were properly within the apartment pursuant to the arrest of Higgins. *United States v. Rodriguez*, 532 F.2d 834, 838 (2d Cir. 1976). Once they encountered the defendant in the apartment they were entitled to question him and to determine his identity. *Id.* at 838-39.

The defendant argues that his presence in the apartment with Higgins provided insufficient justification for his detention and questioning. He relies upon *Sibron v. New York*, 392 U.S. 40 (1968). In *Sibron*, however, the defendant was stopped and searched after officers observed him talking to known narcotics addicts in a restaurant. Heroin was discovered on his person and the officers arrested him. The Supreme Court held that the herion thus discovered was inadmissible in subsequent proceedings against Sibron because there had not been probable cause to arrest him at the moment the search was undertaken and the search could not be justified on protective grounds under *Terry v. Ohio*, 392 U.S. 1 (1968). The Court stated that "[t]he inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." 392 U.S. at 62.

The facts of the present case, however, provide ample grounds to support the law enforcement officers' limited intrusion. Unlike Sibron, the defendant was not merely talking with known addicts in a public place; he was actually living with Robert Higgins, a suspected drug dealer, for whom the officers had an arrest warrant, in an apartment which was being kept under surveillance as a result of Higgin's drug-related activities. The law enforcement officers who came for the purpose of arresting Higgins were clearly justified in any suspicions they may have had that the defendant was more than a mere bystander who had no connection at all with Higgins's activities. Under these circumstances, they were entitled to find out who he was and to detain him for questioning. *United States v. Rodriguez*, 532 F.2d 834, 838-39 (2d Cir. 1976); *see United States v. Santana*, 485 F.2d 365, 368 (2d Cir. 1973), *cert. denied*,

415 U.S. 931 (1974); *cf. United States v. Tramunti*, 513 F.2d 1087, 1100-04 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975).

The Government's procurement of the defendant's operator's license is supportable on the strength of additional considerations. The total circumstances supplied reasonable grounds to justify the belief that the unidentified Marchand might be an accomplice of Higgins and might attempt to destroy the means of identification and any evidence that might be contained in the wallet. In these circumstances the team of officers, who arrested Higgins, properly took possession of the wallet on the table near where Marchand had been seated. *See United States v. Manarite*, 448 F.2d 583, 593 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971).

Since the defendant apparently refused to cooperate by giving them his name, the officers were justified in removing his license from his wallet in order to identify him. This is the type of limited intrusion sanctioned by the language of *Adams v. Williams*, 407 U.S. 143, 145-46 (1972). Indicative of the restraint exercised by the officers in obtaining the identifying information from the defendant's wallet is the fact that nothing other than his license was sought nor removed from his wallet at the time of this initial contact. The address book and other papers were not discovered and removed until after the defendant was under arrest. Since the later, more thorough search of the defendant was pursuant to a valid arrest on probable cause, the address book and other papers were legally obtained within the teaching of *Chimel v. California*, 395 U.S. 752 (1969).

Even if Special Agent Harris and the other law enforcement officers had not been justified in removing the defendant's operator's license from his wallet in order to identify him, the resulting identification would nevertheless be admissible. The defendant himself testified that after

Robert Higgins was arrested at the door of the apartment he saw Higgins walk through the dining room on his way to his bedroom. Since the wallet was on the dining room table, it was subject to valid search and seizure for contraband or other evidence in connection with Higgins's arrest, under the teaching of *Chimel v. California, supra.* *See United States v. Manarite, supra.* Because the arrest of Higgins would provide ample justification for a search of the defendant's wallet, it is immaterial whether the search could be independently justified with respect to the defendant. *See United States v. Griffin*, 413 F.Supp. 178 (E.D. Mich. 1976). The defendant's motion to suppress must be denied.

IV. *Motion for Inspection of Grand Jury Minutes*

The defendant's motion, pursuant to Fed.R.Crim.P. 6(e), for inspection of the minutes of the grand jury's proceedings is unaccompanied by a memorandum in support as required by Local Rule 9. The defendant's assertions of "particularized need" for inspection go to the quality and completeness of the information presented to the grand jury. As explained in the court's discussion of the defendant's motion to dismiss the indictment, an indictment which is valid on its face is not subject to attack on the ground that the grand jury acted on the basis of "inadequate or incompetent" evidence. *See United States v. Calandra*, 414 U.S. 338, 344-45 (1974).

At most, the defendant has alleged that some of the evidence presented to the grand jury may have been "inadequate or incompetent"; he has failed to make any showing of "particularized need." *See Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959); *United States v. Weinstein*, 511 F.2d 622, 627 (2d Cir.), *cert. denied*, 422 U.S. 1042 (1975). The defendant's bare claim of need for the grand jury minutes does not outweigh the "long-established policy that maintains the secrecy of grand jury proceedings in the federal courts." *United States v. Proctor & Gamble Co.* 356 U.S. 677, 681 (1958). Thus, the defendant's renewed motion must fail.

It is ORDERED:

1. *That the motion of the defendant to dismiss the indictment against him is denied;*
2. *That the motion of the defendant to suppress identification testimony of Victor Roy is granted; the motion to suppress the identification testimony of Richard Perkins is denied;*
3. *That the motion of the defendant to suppress evidence obtained at the time of his arrest is denied;*
4. *That the renewed motion of the defendant for inspection of the minutes of the grand jury proceedings is denied; and*
5. *That the case will be set for trial to commence Monday, December 20, 1976, at 9:30 a.m.*

Dated at Rutland, in the District of Vermont, this 30th day of November, 1976.

JAMES S. HOLDEN,
Chief Judge.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA

v.

CRIMINAL ACTION
FILE NO. 76-51

ROBERT P. MARCHAND, JR.

Order.

Paragraph 2 (at p. 20) of the Order of the court filed in this case on November 30, 1976, is amended to provide:

2. ***That the motion of the defendant to suppress identification testimony of Victor Roy is granted without prejudice to a further offer by the Government to establish at trial, out of the presence of the jury, that an adequate independent basis exists to support in-court identification of the defendant by the witness Roy; the motion to suppress the identification testimony of Richard Perkins is denied.***

It is so ORDERED.

Dated at Rutland, in the District of Vermont, this 8th day of December, 1976.

JAMES S. HOLDEN,
Chief Judge.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1288—September Term, 1976.

(Argued June 9, 1977 Decided August 22, 1977.)

Docket No. 77-1131

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT P. MARCHAND, JR.,

Appellant.

Before:

FRIENDLY, TIMBERS and MESKILL,

Circuit Judges.

Appeal from a judgment of the District Court for Vermont, James S. Holden, *Chief Judge*, convicting appellant, after a jury trial, on one count of an indictment charging the possession and distribution of 180 pounds of marijuana in violation of 21 U.S.C. § 841.

Affirmed.

JEANNE BAKER, Esq., Cambridge, Mass.

ALAN M. DERSHOWITZ, Esq., Cambridge, Mass. (Rosenberg, Baker & Fine, Esqs., Cambridge, Mass., and Joseph S. Oteri, Esq.; Martin G. Weinberg, Esq., and Oteri &

Weinberg, Esqs., Boston, Mass., of Counsel), *for Appellant.*

JILL A. JACOBSON, Esq., Assistant United States Attorney, District of Vermont (George W. F. Cook, United States Attorney, District of Vermont, of Counsel), *for Appellee.*

FRIENDLY, *Circuit Judge:*

Robert P. Marchand, Jr. appeals from his conviction, after a jury trial before Chief Judge Holden in the District Court for Vermont, on one count of an indictment charging the possession and distribution of 180 pounds of marijuana in violation of 21 U.S.C. § 841.[1]

Apart from a serious question under the Fourth Amendment discussed in Part IV below, the appeal has been presented as if this were a case where there is substantial doubt that defendant is the person who committed the crime charged in the indictment. Marchand relies on an array of cases, somewhat weakened as a result of recent Supreme Court decisions, which had laid down stringent requirements to prevent "the awful risks of misidentification" by persons with relatively scant opportunity to observe the defendant, *Brathwaite* v. *Manson,* 527 F.2d 363 (2 Cir. 1975), *rev'd,* —— U.S. —— (1977), 45 U.S.L.W. 4681 (U.S. June 16, 1977). But, as the trial judge and the jury seem to have been well aware, that is not this case at all. The case is rather one of accomplice witnesses, one of whom had known the marijuana supplier for years. The jury could well have inferred that any difficulty these witnesses expressed about identification was due to unwillingness rather than inability to identify. It

1 The indictment also contained a conspiracy count, but this was dismissed before Marchand's arraignment.

was a similar case of seeming unwillingness that led us, in *United States* v. *De Sisto,* 329 F.2d 929 (2 Cir.), *cert. denied,* 377 U.S. 979 (1964), to rule that previous identification or grand jury testimony of a trial witness could be used not simply for "impeachment" but as substantive evidence—a ruling which Congress has now translated into Federal Rule of Evidence 801(d)(1)(A) and (C). None of this means that Marchand did not have the right, accorded every criminal defendant, to a fair trial in accordance with governing rules of law. It does mean that statements in decisions involving dubious identifications by bystanders, law enforcement officers or victims[2] should not be woodenly applied to the wholly different situation here and that the case offers ample occasion for recalling Judge Learned Hand's observation in *Dyer* v. *MacDougall,* 201 F.2d 265, 269 (2 Cir. 1952), that a jury is free, on the basis of a witness' demeanor, to "assume the truth of what he denies" although a court cannot allow a civil action, much less a criminal prosecution, to go to the jury on the basis of this alone.

I. *A Chronological Summary*

Marchand challenges his conviction on the grounds both of trial error and of insufficiency of the evidence properly admitted.[3] Before considering these challenges it will be useful to summarize what admittedly occurred. When we include material that was not before the trial jury, we will so indicate.

Sometime before June 1971, Victor Roy, Jr. became acquainted with a man at bars in Amherst, Mass. When

2 See discussion at pp. 32-33 & n.27 *infra.*

3 Indeed, by making insufficiency the first point of his brief, Marchand seems to argue that the evidence was insufficient even if all was properly admitted. *See also* Appellant's Brief at 26 n.28.

testifying before the grand jury, Roy identified this person as "Big Foot" or "Bob"; at trial he insisted on the appellation "Big Foot". In March or April, 1975, Roy met the same individual, again in a bar in Brattleboro, Vermont; he was with a girl whom Roy identified before the grand jury as Ann.[4] The man gave Roy a telephone number, which Roy called occasionally. In May 1975, Roy, accompanied by Richard Perkins, met the individual at a Howard Johnson's restaurant in Springfield, Mass., to discuss the purchase of marijuana. On two occasions within the following three weeks, Roy and Perkins made purchases of marijuana from Big Foot at the Springfield Howard Johnson's.

During the period June 9-July 16, 1975, there were four one minute phone calls from Perkins' number in Waitsfield, Vt., to the numbers listed in the name of Ann Curtis and Robert Marchand in Guilford, which is near Brattleboro, Vermont; there was proof that Bob Marchand was living with Ann Curtis at the time. On July 17 there was a four minute phone call from Perkins' number to Marchand's. The next day, July 18, Perkins and Roy drove to Brattleboro, waited for a while at the Howard Johnson's restaurant there, met Big Foot and another male, and then drove out into the country, where 180 pounds of marijuana were transferred from Big Foot's car to Perkins'. On this date there were three phone calls to Ann Curtis' number in Guilford which were billed to Perkins' number in Waitsfield. The first, from Perkins' home phone, lasted three minutes. The other two—each lasting not over one minute —were from Brattleboro, where Perkins and Roy met Big

4 Roy was quite positive about this when he testified before the grand jury in July, 1976. At trial he could not "really . . . recall" whether Marchand had a girl with him and said that his grand jury testimony was "not completely truthful." However, he repeated that the girl's name "could have been Ann." *See* p. 13 *infra*. The jury was amply justified in inferring that it was.

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Foot for the marijuana transaction. Perkins and Roy were arrested later in the day when they tried to sell the marijuana to an undercover agent.

Roy refused to make any statement to the arresting officer, Agent Handoga of the Drug Enforcement Administration (DEA). Within two weeks after the arrest, Perkins gave Agent Handoga a description of the seller as "a six foot one, 220 pound man with blond hair", aged between 25 and 30, and "big features", defined to include "a big nose, big hands, broad shoulders". About a month later, Perkins who had some ability as a portraitist, drew a sketch which was designed to be a picture of the marijuana supplier.

Agent Handoga testified at the suppression hearing later referred to that in August 1975 he had received information from an undisclosed source that Marchand was the supplier. Accordingly the Government sought an indictment of Marchand.[5]

In September 1975 Perkins testified before a grand jury. He stated that "he found out [Big Foot's] name was Bob Marchand." Roy did not appear before this grand jury and it was discharged before the investigation was complete, without the filing of an indictment against Marchand.

On April 26, 1976 Perkins was shown fifteen photographs by Agent Handoga and was asked to pick two that most closely resembled the people he had seen at the time of the marijuana transaction. He first picked three and later narrowed his choices to two. One was a photo of Marchand. Perkins testified at the suppression hearing that he did not feel he was being encouraged or pressured to select the

5 Roy and Perkins had been indicted shortly after their arrest; they pleaded guilty in December, 1975. In March, 1976, Perkins received a suspended sentence and three years probation; Roy received a fine of $2000, a suspended sentence, and 3 years probation.

photograph that he did but was not certain that the individual depicted was the supplier. Roy, according to his testimony at the suppression hearing, was in Colorado during this period. On his return to Vermont he was served with a subpoena to appear before the grand jury. Immediately before his appearance on July 1, 1976, Roy arrived at the office of the United States Attorney in Burlington and went to a small interview room accompanied by Agent Handoga and Assistant United States Attorney O'Neill. Roy informed the agent that he had received the marijuana from someone named "Bob" or "Big Foot". Agent Handoga showed Roy a series of 14 photographs. On his first and second viewings he selected a photograph of someone he thought to be Jim Hathaway of Burlington; he was told he was in error. On a third viewing Roy selected a photograph of Marchand but added "this picture looks funny." The agent then produced a larger photograph of Marchand, interjecting "Oh, here's a Bob, what about this one?" Roy responded that the larger photograph "looks similar".[6] The agent then said "Ah, that's Marchand."

In the afternoon Roy testified before the grand jury. We have already covered much of this testimony. Important additions were a statement that he had known the person with whom he and Perkins had communicated in order to buy the marijuana as "Bob" and a confirmation that he had selected the photograph of the person he believed to be Big Foot. After hearing Agent Handoga present his own observations and Perkins' testimony before the earlier grand jury, the second grand jury returned an indictment against Marchand on July 22, 1976. An arrest warrant issued on the same day.

In the interval between Roy's appearance and the indict-

6 The first photograph suffers from glare. The second appears to have been taken when Marchand was somewhat older.

ment, Timothy S. Hillman, a Massachusetts assistant district attorney who was to be called as a defense witness at trial for a reason that will later appear, came to Vermont. Marchand was a "civil client". Hillman had had "occasion to hear that photographs of [his] . . . client had been shown to the Grand Jury" in Vermont.[7] After talking with Roy, Hillman received "the impression that Victor had spoken to some people about an incident involving himself and some marijuana and that during the conversation he had had [sic] that Bob had been mentioned and the whole thing involved some sort of a transaction at the University of Massachusetts."[8] He had also received information that before testifying before the grand jury Roy had been shown pictures of Marchand and possibly of Ann. Hillman got "the impression . . . that the whole transaction went down at the U. Mass. Bar but whether or not the transaction went down with Bob or that is what he told him, I don't know . . . ." He communicated all this to Marchand, who asked what he should do; Hillman gave Marchand directions how to get to Roy's house and "told him to get himself a darned good criminal lawyer and to get investigators sent up right away, because I believed that he was in trouble."

7 Hillman also characterized the reason for his trip as follows:

> I had gone to Vermont when I had received some information to talk to Victor Roy whom I had even known from high school as an acquaintance. I received information and I went to,—up to Vermont, to determine exactly what I had heard and exactly what Victor had said to anybody, if he had. While the prosecutor did not seek to have this made more definite, Hillman, under cross-examination, accepted as a fair characterization that the incident was a warning by Roy for him to tell Marchand that Roy had talked to the federal authorities about the crime.

8 The University of Massachusetts is at Amherst, Mass., where Roy first met Bob/Big Foot.

Some time after this, Marchand departed for the Miami area in Florida.[9] Apparently the Government knew that he had, for it sent a photograph of Marchand to the Dade County, Florida, police and Agent Handoga spoke on the telephone to Detective Adcock of the Dade County police about Marchand.

This led to the final episode. At 7:30 a.m. on August 24, 1976, Special Agent Harris of the DEA office in Miami, accompanied by DEA Special Agent McGlassius and two Dade County detectives, Adcock and Sadler, went to the apartment of Robert Higgins in Lauderhill, Florida, to arrest Higgins pursuant to a federal arrest warrant on charges of sale and distribution of marijuana and conspiracy to import marijuana. The group was joined by a uniformed Lauderhill police officer outside the apartment, which had been under surveillance. Higgins answered the door and was placed under arrest. He informed the officers that another person was in one of the bedrooms. Marchand emerged, wearing only a pair of pants. Agent Harris asked one or more of the officers to ascertain his identity and make sure he was not armed.[10] Marchand was allowed to return to his bedroom to don a shirt and was told that, although not under arrest, he could not leave the apartment but should remain seated in the dining room. Meanwhile Agent Harris had gone with Higgins to the latter's bedroom to watch him dress. While Harris was there, Detective Adcock advised him that Marchand

9 The record is silent as to any efforts to execute in Vermont the arrest warrant issued on July 22. Curiously also the Government made no effort, either at trial or before us, to argue that particularly in light of Hillman's advice Marchand's departure was some evidence of consciousness of guilt, *see United States* v. *Heitner*, 149 F.2d 105, 107 (2 Cir. 1945); 2 Wigmore, Evidence § 276(4) (3d ed. 1970), and cases from other circuits cited in 1975 Supplement at 36.

10 The record does not reveal how these directions were carried out.

was a fugitive from the District of Vermont. This conclusion was based on previous telephone conversations with Agent Handoga, prior observations of a photograph that had been sent to Miami, and inspection of a driver's license she had extracted from a wallet lying on the apartment's dining room table. Agent Harris further verified Marchand's identity by calling Agent Handoga in Vermont and then made the arrest. In the course of the arrest, Harris searched Marchand and removed a small address book and various papers and written notes from a rear pants pocket. One of the notes related to Marchand's conversation with Hillman; we reproduce this in the margin.[11]

II. *The Suppression Motion*

Marchand moved to suppress the photographic identification by Perkins and Roy and the note seized at the time of his arrest. Chief Judge Holden conducted a hearing and made findings of fact, on which we have relied in the previous section, and conclusions of law.

The court denied the motion to suppress Perkins' photographic identification, overruling objections that the array included bearded individuals, some with long hair, whereas the person outlined in Perkins' sketch was clean-shaven with short hair, that the array included two photographs of Marchand, and that Marchand's was one of only two large photographs in the array.

11 —T Bird
—pictures of Ann & Bob
—met me at U Mass Bar
approx
—
Warren-
2d house after P.O.
Mars Hotel

Victor Roy testified at trial that his home in Warren, Vermont, was two houses down from the post office.

With respect to Roy's identification, the judge found that Roy had made no positive identification of Marchand and also that his identification, "such as it was" was "infected by suggestion." Accordingly he granted the motion to suppress the evidence.

The judge also denied the motion to suppress the note seized on Marchand's arrest. Since we agree with his conclusion but not with his reasons, it is unnecessary to set out the latter.

III. *The Trial*

Perkins and Roy both testified to the marijuana transaction substantially as set forth in Part I of this opinion. Since there is no dispute that the transaction occurred, there is no need to repeat this.

Perkins testified to having given Agent Handoga the description of "Big Foot" set forth in Part I and supplemented this with a consistent description of the supplier as looking "very large. Very healthy. Very short hair, like a football player would look after he had been working out . . . [and dressed in] shorts or casual pants and T shirt" and tanned and unbearded.[12] Over objection the Government introduced the sketch Perkins had drawn. Although testifying that he had been "trying to draw a picture of the person who gave [him] the marijuana," cross-examination elicited a statement that he had testified at the suppression hearing "when I was drawing it I didn't really feel that it was anything," and further

> In my mind, I, when I was sketching it I just sat there for the longest time and didn't really know what to draw and that was just a—I just remember he was a great big, blond-haired guy and he just had big features. And I just drew a big, blond-haired, you know, male features.

12 Apparently Marchand had a beard at the time of trial and also wore glasses, as to which Perkins had no recollection. Timothy Hillman testified that Marchand had at times worn a beard and at other times had not over the past few years.

He also acknowledged his earlier statement that he "didn't have a terribly good memory of [Big Foot] at the time he made the sketch" and said that when he was drawing it he "just [sat] there with a blank and just like I just drew it" and that when he finished it he was not satisfied that it was a fair and accurate picture of Big Foot. The jury was not bound, as counsel seems to believe, to credit Perkins' disclaimer as against the excellence of his sketch; indeed it could have drawn quite a different inference. Comparison of the sketch with the photograph later selected by Perkins makes it almost impossible to suppose that Perkins had never seen the subject of the photograph.[13]

When asked to make an in-court identification, Perkins was unable to do this, perhaps for the reasons indicated in fn. 12, perhaps for others. He testified that two by-standers and Marchand who stood before him "resemble Bob, Big Foot in some way"; he thought there was "a good possibility" that if Big Foot were standing in front of him, he would be able to make an identification. The jury may have been more impressed by his slip of the tongue shortly thereafter when he was being cross-examined in regard to the sketch (App. p. 333):

> Q. Now at the time you made it, you didn't have a very clear vision in your mind of what this Big Foot looked like, did you?

13 We refer specifically to the fix of the eyes, a protrusion of the lower nostrils, the set of the ears, and what looks like a small dimple on the chin. The chance that Perkins could have dreamed up a face having all these resemblances to the photograph that was later to be exhibited to him, and no significant differences, is almost infinitesimal.

A. I never really did, *except now when he was standing in front of me* and it was always a fairly nervous type of arrangement. (Emphasis supplied.)

We do not see how this can mean anything else than that the man "standing in front of" Perkins, namely, the defendant Marchand, was Big Foot.

Perkins admitted making the photographic identification but defense counsel brought out that the pictures were selected as being "closest" to his recollection and that he had made no positive identification. The court refused to give an instruction precluding the jury from relying on Perkins' photographic identification as substantive evidence of Marchand's guilt.

The prosecutor also asked Perkins if he could remember Big Foot's phone number. When he could not, she gave Perkins the toll records for his phone for June and July 1975 to refresh his recollection. Perkins chose the number subsequently proved to be that of Ann Curtis and Bob Marchand, stating, "this could be it," though he added on cross-examination that he could not be certain this was Big Foot's number.[14]

The prosecutor called Roy in an effort to secure an in-court identification.[15] Roy didn't see Big Foot in the court-

14 After introduction of the telephone toll records evidencing the calls referred to in Part I of this opinion, the defense cross-examined Roy to bring out that he sometimes called Marchand from Perkins' number but allegedly as a prospective purchaser, not seller, of marijuana and that he had called Big Foot on July 18 but could not recall his number. Perkins testified that the July 18 transaction was set up by a call he had received from Big Foot rather than "made to him." The jury, of course, was not required to credit any of these explanations. The telephone calls were stipulated and the jury was free to draw a strong inculpatory inference from them.

15 The judge ruled that an in-court identification would not be tainted by the attempted photographic identification. The ruling was clearly correct on the facts here. The judge's initial basis for excluding evidence

room although "there's probably a number of people here that might look vaguely like him." On cross-examination Roy picked out four people, including Marchand, all of whom "looked like this Big Foot" but added that Marchand "is not him." The prosecutor referred to Roy's grand jury testimony where he had named Marchand as the supplier. Instead of reading this, she proceeded, without objection, as follows:

Q. And where you telling the truth to the Grand Jury that day?

A. Well, as I said before, I was misleading the Grand Jury to believe, influences,—

Q. Isn't it a fact, Mr. Roy, that you led the Grand Jury to think that you could identify Robert MARCHAND as the person who supplied you with the marijuana?

A. I guess that is what it came down to.

Q. And is that true, Mr. Roy?

A. Is it true that I misled the Grand Jury to believe that—

Q. Is it true that that is what you did, yes.

A. I would say, yes.

of Roy's examination of the photograph was that he had not in fact made positive identification; it was only later that the ground of suggestiveness was added. We think the former conclusion is belied by Roy's acknowledgement before the grand jury that he had selected the photograph of the person he believed to be the "Bob" from whom he had purchased marijuana. We also doubt the validity of the latter conclusion. Without any suggestiveness, Roy had selected a photograph of "Bob," although saying it looked "funny." We see no impermissible suggestiveness in the agent's then supplying a better photograph of the same person, despite the agent's comment when producing the picture, "OK, here's a Bob, what about this one?" Roy had already narrowed the universe to "Bobs" and had picked out a photograph of Bob Marchand.

After acknowledging that the defendant was a friend, Roy was further questioned along the same lines:

A. And yet you led a Grand Jury to believe that this person—this friend of yours, was the one who supplied you with marijuana, is that right?
A. Yes, that's what it came out to be.

The prosecutor also questioned Roy about who had accompanied Big Foot when Roy resumed acquaintance with him at a Brattleboro bar. Roy first answered "a girl. . . . I really don't know [her name] but it could have been ANN." When pressed about his somewhat more positive testimony before the grand jury, he couldn't recall whether Big Foot was with a girl, and admitted that he had misled the grand jury. More questioning added to the confusion: Roy had indeed seen Marchand with Ann and knew that they were friends and probably were living in the same house. This led to the following exchange:

Q. Do you recall that you testified in the grand jury that you saw Bob or Big Foot your supplier, with Ann?
A. That is the way the grand jury testimony reads.
Q. And is that the same Ann you know as a friend or companion of Mr. Marchand?

• • • • •

A. The Ann that I was referring to in there was.
Q. It was the same one?
A. (Nodding)

On cross-examination, Roy stated if there was a girl with Big Foot, he had never seen her with Marchand.

Agent Handoga testified with respect to Perkins' photographic identification. He said that Perkins had been

asked to identify the two persons who had sold the marijuana, not the two photos that looked "most like" them.

The Government concluded its case with the testimony of Agent Harris as to the note seized from Marchand at the time of his arrest. The defense case was limited to the testimony of Hillman seeking to explain this.

We shall defer to Part IV of this opinion a description of the prosecutor's summation and the charge and of defendant's points about them.

After returning to the courtroom with a request to hear Roy's testimony, the jury brought in a verdict of guilty.

IV. *The refusal to suppress the note seized on Marchand's arrest*

We shall deal first with Marchand's claim that seizure from his person at the time of his arrest of the note relating to Hillman's meeting with Roy violated his rights under the Fourth Amendment since this issue is separable and, if defendant were right, a new trial would be required.[16] If Marchand's arrest was legal, the search of his pants was likewise so. As said in *United States* v. *Robinson*, 414 U.S. 218, 235 (1973):

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the

16 Apart from the effect of the note itself in linking Marchand with Roy, it had the practical consequence of compelling the defense to produce Hillman, whose evidence could well have had some adverse effect.

person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.

However, counsel stoutly contends that the arrest was illegal since it was based on the driver's license which Detective Adcock had obtained in the course of an unlawful search of the wallet that Marchand had left on Higgins' dining room table.

If the arrest stemmed solely from the discovery of Marchand's name on the driver's license, we would be constrained to agree, particularly in light of the decision in *United States* v. *Chadwick*, —— U.S. —— (1977), 45 U.S.L.W. 4797 (U.S. June 21, 1977), rendered after this case was argued. But it did not. The trial court found that "Detective Adcock recognized the defendant from having seen his photograph" and that "She also recognized the defendant's name" which she apparently had obtained from the driver's license.[17]

A preliminary point should be cleared up before we proceed further. In a letter submitted after the argument, defense counsel raised the claim that the photograph to which the trial judge referred was on the driver's license. The finding is not worded that way and the testimony of Agent Harris was that Detective Adcock "stated she had seen a picture of this person *before*. . . ." (em-

17 In a quite garbled response to defense counsel's assertion that Agent Harris did not know how Detective Adock identified Marchand, the Agent said, "I would assume from the driver's license that obviously had given the driver's license, or had been taken, one way or the other. I don't know which way. And was identical, was identified. That's the normal procedure to identify the persons any how." We do not think this confused passage undermines the trial court's finding that Detective Adcock identified Marchand on the basis of his picture as well, since Harris testified that she *stated* she recognized Marchand from the picture, and especially since there was evidence that she had seen a picture and had talked with Agent Handoga about the case.

phasis supplied).[18] Further, there was no evidence that there was a picture on Marchand's driver's license. However, there was evidence, already mentioned, that a photograph had been sent to Detective Adcock, "a specially trained, assigned and experienced officer," *Manson* v. *Brathwaite, supra,* —— U.S. at ——, 45 U.S.L.W. at 4686, and the judge permissibly found that she had seen this before the visit to Higgins' apartment.

We have no doubt that the photograph constituted probable cause for arrest without the reinforcement afforded by the discovery of Marchand's name. Here there was no need for the arresting officers to determine whether there was probable cause to believe that a crime had been committed and that a particular individual had committed it; that role had been performed by the indictment, *Sciortino* v. *Zampano,* 385 F.2d 132 (2 Cir. 1967), *cert. denied,* 390 U.S. 906 (1968). All that was required was probable cause to believe that the defendant was the subject of the Vermont indictment. Recognition of a photograph sent by the law enforcement officers from Vermont, supplemented by the discovery of the defendant living in the home of a Florida marijuana dealer, afforded such cause.

We thus face the question whether an arrest that would have been legal if effected on these bases alone became illegal because Detective Adcock improperly extracted Marchand's driver's license from the wallet lying on the dining room table, thereby learning his name and gaining added assurance.[19] While we have found no federal au-

18 Use of hearsay is not banned on motions to suppress. Federal Rule of Evidence 1101(d)(1); *United States* v. *Matlock,* 415 U.S. 164, 172-76 (1974). Doubtless in recognition of this, there was no objection to Agent Harris' testifying to what Detective Adcock had said.

19 It is plain that lack of this added assurance would not have prevented discovery of the note. The police clearly had ample basis for detaining Marchand for questioning under *Terry* v. *Ohio,* 392 U.S. 1 (1968);

thority squarely on this, we see no significant distinction between the question here presented and that arising where both legally and illegally obtained evidence have been offered to obtain a search warrant.[20] The validity of the warrant was upheld under such circumstances in the leading case of *James* v. *United States*, 418 F.2d 1150 (D.C. Cir. 1969). There an officer responded to a report that several men were engaged in mechanical work on a car parked in a public street. When the officer arrived on the scene, he saw the men at work on one of two cars in the street and a third car in a garage, though a man in the garage shut the door quickly on perceiving the officer. When the officer returned four days later, the garage door was open. The new car he had seen there was almost completely stripped. The officer entered the garage and copied down the rear license plate number. A check re-

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if he refused to give his name, or gave a false one, either could have led to his arrest and an incidental search of his pants. Alternatively, the police could have detained Marchand while they obtained a warrant and thereby learned Marchand's name, with the same consequences. *See United States* v. *Falley*, 489 F.2d 33, 41 (2 Cir. 1973) (where broker and importation documents would have been discovered anyway, illegally obtained evidence that shortened or facilitated the investigation "did not supply fruit sufficiently poisonous to be fatal"); *United States* v. *Cole*, 463 F.2d 163 (2 Cir.), *cert. denied*, 409 U.S. 942 *cert. denied*, 409 U.S. 942 (1972) ("Conduct is not the legal cause of an event if the event would have occurred without it."). *But see United States* v. *Ceccolini*, 542 F.2d 136, 140-41 (2 Cir. 1976), *cert. granted*, 45 U.S.L.W. 3715 (1977) (prosecution did not show by a preponderance of the evidence that witness' testimony would inevitably have been secured absent the illegal search).

20 The Supreme Court of Florida has recently held that "an officer possessing legally obtained information sufficient to constitute probable cause for an arrest is not barred from making an arrest solely because he also has information which was unlawfully obtained." *Sheff* v. *State*, 329 So.2d 270, 273 (Fla. Sup. Ct. 1976). This holding, which relies on the federal cases we discuss below, is precisely on point with the case at bar. We agree with the quoted legal proposition, although the court's conclusion that the original taint did not infect the subsequent observation may be open to debate.

vealed that the vehicle was stolen, and a search warrant for the garage was obtained. Judge Leventhal found that the action of the man in closing the garage door quickly upon the officer's first visit, and the officer's subsequent observation of a new car completely stripped—valid under the plain view doctrine—provided probable cause for a search of the garage irrespective of the further information gathered during the officer's illegal entry. The court then stated:

> When an affidavit in support of a search warrant contains information which is in part unlawfully obtained, the validity of a warrant and search depends on whether the untainted information, considered by itself, establishes probable cause for the warrant to issue. Wong Sun v. United States, in announcing the "fruit of the poisonous tree" doctrine, limited the exclusionary rule to evidence which the police could not trace to some "independent" and lawful source. While the Supreme Court has not specifically had occasion to consider whether this doctrine is applicable to a search warrant that issues on the basis of an affidavit setting forth information both lawfully and unlawfully obtained, other circuits have applied the "independent source" test. If the lawfully obtained information amounts to probable cause and would have justified issuance of the warrant, apart from the tainted information, the evidence seized pursuant to the warrant is admitted. 418 F.2d at 1151-52 (footnotes omitted).

This circuit had an early encounter with the problem in *Parts Mfg. Corp.* v. *Lynch*, 129 F.2d 841 (2 Cir.), *cert. denied*, 317 U.S. 674 (1942). There, certain auto parts alleged to have been stolen from Ford Motor Co. had been ordered returned as illegally seized, *see Weinberg* v. *United*

States, 126 F.2d 1004 (2 Cir. 1942). Before they were returned, FBI agents gave Ford a detailed list of the property seized. Ford replevined the property, which was seized by a New York deputy sheriff and stored in a warehouse. The Assistant U.S. Attorney thereupon visited the warehouse, examined the parts, and subsequently obtained a search warrant, which was executed before Parts Mfg. Co. could retake the goods. It moved that the FBI special agent be required to return the goods because the search was based on information obtained as a result of the illegal first search. Judge Clark found that the Government had sufficient information, independent of any that was obtained illegally, to validate the search warrant. He stated further, "Actual examination of the property in the warehouse . . . simply confirmed what affiants already had reasonable cause to believe would be found." *Id.* at 843. Such confirmation did not dictate return of the evidence.

We discussed the taint problem more recently in *United States* v. *Capra*, 501 F.2d 267 (2 Cir. 1974), *cert. denied*, 420 U.S. 990 (1975), in the context of a warrantless search. There, the district court upheld such a search of the defendant's car on the grounds that one of the federal agents knew of defendant's prior use of his car for narcotics transactions and therefore had probable cause to believe that the car was carrying contraband. We noted that even if this agent's knowledge of defendant's uses of his car was derived from an illegal wiretap sixteen months before, another agent present at the search had knowledge of defendant's activities as a narcotics deliveryman that had been legally obtained from an informant, and held that such knowledge was sufficient to sustain a finding of probable cause. *Id.* at 280 n.12.

Other circuits have held squarely that the presence of illegal evidence in affidavits presented for a search warrant

does not prevent a finding of probable cause sustainable on other grounds. *See United States* v. *Sterling*, 369 F.2d 799, 802 (3 Cir. 1966) ("[T]he law is quite clear that the inclusion of illegally obtained evidence does not vitiate a search warrant which is otherwise validly issued upon probable cause reflected in the affidavit and based on proper sources."); *United States* v. *Tarrant*, 460 F.2d 701, 703-04 (5 Cir. 1972) (where legally obtained information established probable cause, the court need not consider attacks on the legality or sufficiency of other allegations in the affidavits); *United States* v. *Koonce*, 485 F.2d 374, 379 (8 Cir. 1973) (where affidavit by one officer cited statements of two informants that defendant possessed a stolen boat and indicated the location of the boat from defendant's grand jury testimony, the court need not reach questions raised by search conducted by another officer); *Chin Kay* v. *United States*, 311 F.2d 317, 321-22 (9 Cir. 1962) (unnecessary to consider attacks on two paragraphs of affidavit since others sufficient to establish probable cause); *Howell* v. *Cupp*, 427 F.2d 36, 38 (9 Cir. 1970) (officer's finding stolen property in defendant's front seat provided probable cause for warrant to search trunk, not invalidated by previous illegal search of trunk which informed officers of the contents). Insofar as contrary dicta of the Sixth Circuit in *United States* v. *Langley*, 466 F.2d 27, 35 (1972), and *United States* v. *Nelson*, 459 F.2d 884, 889 (1972), may not be distinguishable as Mr. Justice Powell has thought them to be, *see Giordano* v. *United States*, 416 U.S. 505, 556 n.6 (dissenting opinion), we continue to adhere to the majority view.[21]

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21 It cannot be successfully argued that *Giordano* impliedly disapproved the line of cases discussed above or dictates a contrary result in this case. There, the majority rejected the argument that because an original pen register order was made prior to an illegal wiretap, the two exten-

It is true, of course, that if the sole guiding beacon in a Fourth Amendment case were the maximization of deterrence, all evidence obtained by illegal means in any significant part would have to be suppressed, even though there was a sufficient lawful basis for securing it. But the Supreme Court's decisions on other points of Fourth Amendment law demonstrate that it is not disposed to tilt the balance that far. *Alderman* v. *United States,* 394 U.S. 165 (1969); *United States* v. *Calandra,* 414 U.S. 338 (1974); *Stone* v. *Powell,* 428 U.S. 465 (1976). On the basis of the attitude embodied in such decisions, the precedents here reviewed, and our own belief that a violation of the Fourth Amendment should not require exclusion of evidence that was obtainable without it, we uphold the denial of the motion to suppress the note found on Marchand in a search incident to what we consider to have been a lawful arrest.

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sions subsequent to the illegal tap could be sustained by the same showing of probable cause as the original order. The Court stated:

> The application for the October 22 extension attached the logs of telephone conversations monitored under the October 16 order and asserted that these logs revealed the "continued use of the telephone . . . for conversations regarding illegal trafficking in narcotics." App. 55. In these circumstances, it appears to us that the illegally monitored conversations should be considered a critical element in extending the pen register authority. We have been furnished with nothing to indicate that the pen register of November 6 should be accorded any different treatment.

We think the Court clearly meant that the extension order could not have been granted absent the illegal evidence.

Reference should perhaps be made to cases in this circuit where a tax "saturation investigation" was launched partly from legal and partly from illegal leads. Any implication from language in *United States* v. *Schipani,* 414 F.2d 1262, 1266 (2 Cir. 1969), *cert. denied,* 397 U.S. 922 (1970), that an indictment stemming from such an investigation should be dismissed—and we doubt whether such an implication was ever justified—has been dissipated by *United States* v. *Friedland,* 441 F.2d 855 (2 Cir.), *cert. denied,* 404 U.S. 867, 914 (1971), and *United States* v. *Cole,* 463 F.2d 163, 172 (2 Cir.), *cert. denied,* 409 U.S. 942 (1972).

V. *Alleged Trial Errors*

(1) *Alleged errors concerning Perkins' pre-trial photographic identification and sketch.*

Appellant mounts a number of attacks relating to Perkins' photographic identification.

His first claim is that the array was impermissibly suggestive because "the neutral effect of multiple numbers was totally undercut by the fact that Marchand's picture was the only one which recurred and that of the two large photographs his was the only one of a light-haired man." (Brief, p. 52). The defense also criticizes the nine months delay in presenting the array, and the use of a photograph display rather than a lineup. We are not persuaded by any of these points. The small photograph of Marchand was somewhat marred by glare; also the larger photograph seems to depict him at a later age. *See* fn. 6 *supra.* Indeed, the photographs were sufficiently different to cause Perkins to select only one. Under such circumstances, over-representation of a defendant in the array does not make the procedure impermissibly suggestive, let alone give rise to "a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States,* 390 U.S. 377, 384 (1968). In *Simmons,* the Court allowed in-court identifications based on a showing of at least six photos, primarily group photographs, with the defendant appearing several times. *See United States* v. *Falange,* 426 F.2d 939, 935 (2 Cir.), *cert. denied,* 400 U.S. 906 (1970) (inclusion of three photographs of defendant, taken years apart and at different angles, in an array of 16 pictures was not a denial of due process); *United States* v. *Cunningham,* 423 F.2d 1269, 1271-73 (4 Cir. 1970) (admission of testimony concerning photographic identifications was not impermissibly suggestive although seven of 14 photographs were of appel-

lants, and the only color photographs were of appellants and a codefendant).

The differences of hair and skin color noted by Marchand were not of great significance since all but three of the pictures were on black and white film. Nor did the differences in size of the pictures cause impermissible suggestiveness. As we have recently said:

> The due process clause does not require law enforcement officers to scour about for a selection of photographs so similar in their subject matter and composition as to make subconscious influences on witnesses an objective impossibility.

United States v. *Bubar*, —— F.2d ——, —— (2 Cir. 1977), slip op. 4519, 4529. *See United States* v. *Magnotti*, 454 F.2d 1140 (2 Cir. 1972) (full-view photograph of defendant in array with seven mug shots did not give rise to impermissible suggestion); *United States* v. *Harrison*, 460 F.2d 270 (2 Cir.), *cert. denied*, 409 U.S. 862 (1972) (that defendant was the only clean-shaven individual in photo array was not such an unnecessarily striking difference as to make him "stand out prominently from the others"). Although the delay was regrettable, it is not decisive, *see United States* v. *Hurt*, 476 F.2d 1164, 1168 (D.C. Cir. 1973) (delay of one year); moreover, Agent Handoga testified that he had no photographs of Marchand until late 1975 or early 1976. While it is preferable for law enforcement officers to use a line-up rather than photographic identification when the suspect is available, this is not a requirement. *United States* v. *Boston*, 508 F.2d 1171, 1176-77 (2 Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975).

Beyond all this, under *Manson* v. *Brathwaite*, *supra*, U.S. —— (1977), 45 U.S.L.W. 4681, decided after this case was argued, even impermissible suggestiveness is not

a *per se* bar to the receipt of a photographic identification; the admissibility of this must be determined on the basis of the totality of the circumstances. Here the first three of the factors noted in *Manson*—the opportunity to view, the degree of attention, and the accuracy of the description weigh in favor of admissibility. Although the two other factors which were relied on in *Manson*, "the witness' level of certainty" and "the time between the crime and the [photographic] confrontation," do not weigh in favor of admissibility, neither are they significant counterweights under the circumstances here presented. The judge was not bound to credit Perkins' expression of uncertainty[22] and there is the unusual fact of the remarkable resemblance between Perkins' sketch, made only a month after the crime, and the photograph later selected by him. There is, further, Perkins' slip of the tongue, which we noted earlier, indicating that Perkins in fact knew Bob Marchand was Big Foot. Moreover, Perkins was under far less pressure to make a photographic identification than the identifying narcotics agent in *Manson*, *supra*, *see* —— U.S. at ——, 45 U.S.L.W. at 4690 (Marshall, *J.*, dissenting); he testified that he felt none.

The defense further contends that evidence of Perkins' pre-trial photographic identification and of the making of the sketch was not within Federal Rule of Evidence 801(d)(1)(C) which says that "A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination and the statement is . . . (C) one of identification of a person made after perceiving him" since that rule allegedly is limited to corporeal identifications. This argument rests on reading the final words "after perceiving him" as referring to the perception at

22 The trial court did not *find*, as defendant argues, that Perkins' photographic identification was uncertain. The court merely reported Perkins' "concession" on that point.

the time of the identification rather than at the time of the crime and then confining "him" to the defendant's person rather than to representations of it. This is too confining. The purpose of the rule was to permit the introduction of identifications made by a witness when memory was fresher and there had been less opportunity for influence to be exerted upon him.[23] We thus agree that "Rule 801(d) (1) (C) should . . . be interpreted as allowing evidence of prior identification by the witness of a photograph of the person whom he had initially perceived," 4 Weinstein & Berger, Commentary on Rules of Evidence for the United States Courts and Magistrates 801-107 to 108 (1976), and also to descriptions and sketches.

The defendant further contends that the purpose of the Rule to allow introduction of more probative evidence than in-court identifications dictates exclusion of the uncertain and unreliable identifications by Perkins. We have already expressed our views with regard to the certainty of the photographic selection. The objection that the sketch should not have been admitted because of Perkins' later disclaimer of it merits little discussion in view of what we have already said about the remarkable correspondence between it and the photograph and about Perkins' telling slip of the tongue. But even if we felt otherwise with respect to these factual matters, we would not hold that the Rule requires exclusion of this evidence. Protection against identifications of questionable certainty is afforded by the requirement that the declarant be available for cross-examination; questions of the probative value of the testimony are thus for the jury. *See* S. Rep. No. 94-199, 94 Cong., 1 Sess. (1975), *reprinted in* 4 Weinstein & Berger, *supra* at 801-4. *See also id.* at 801-4.6. While the trial judge doubtless has discretion under Rules 102 and 403 to exclude an identification which he considers to have been too flimsy to warrant the jury's consideration, appellate courts should be wary of reversing where the judge has decided that the identification was sufficiently certain to be appropriate for submission.

23 As noted at the outset of this opinion, it was fairly inferable that the latter was one plausible explanation of the loss of recollection by the identifying witness Fine in *United States* v. *De Sisto, supra*, 329 F.2d at 932-34.

Appellant argues that even if the evidence was admissible as substantive evidence under Rule 801(d)(1)(C), it should have been excluded as unreliable on the authority of *United States* v. *Jenkins*, 496 F.2d 57, 68-70 (2 Cir.), *cert. denied*, 420 U.S. 925 (1975). But that decision, in a case arising before the effective date of the Federal Rules of Evidence, concerned the different problem when proof of a prior identification (in that case a non-identification of Jenkins and an identification of another) is sought to be proved through a person other than the declarant. See the discussion in 4 Weinstein & Berger, *supra*, 801-108 to 110. While in *Jenkins* we sustained a refusal to allow the third party to testify, we did allow the declarant to testify to his recollection—or more aptly, his lack of recollection—of the photographic identification.

Appellant also objects to the court's having instructed the jury that it could "consider" Perkins' photographic identification and sketch without having given the instruction requested by the defendant as to the dangers inherent in eyewitness identification. In *United States* v. *Fernandez*, 456 F.2d 638, 643-44 (2 Cir. 1972), we said:

> While a defendant is not entitled to a reading of all that was said about the dangers of misidentification in United States v. Wade, supra, 388 U.S. at 228-236, 87 S.Ct. at 1926, and Simmons v. United States, supra, 390 U.S. at 383-384, 88 S.Ct. at 967, we would think it reasonable that a properly drafted instruction, draw-

> ing particularly on Mr. Justice Harlan's language in Simmons, should be given if requested. Whether failure to do so would be reversible error would depend on the circumstances.

The reversal in that case rested on other grounds. Defendant has cited no decision holding that the giving of such a charge is mandatory, and a number have refused to do so. *United States* v. *Evans*, 484 F.2d 1178, 1187-88 (2 Cir. 1973); *United States* v. *Gentile*, 530 F.2d 461, 469 (2 Cir.), *cert. denied*, 426 U.S. 936 (1976); *United States* v. *Barber*, 442 F.2d 517, 525-26 (3 Cir.), *cert. denied*, 404 U.S. 958 (1971) (noting "formidable precedential authority" that cautionary instruction is not required). This would be an exceedingly inappropriate case for seeking to make new law on this subject. The identifications were only a part of the case that Marchand was the supplier, a less important part than counsel would have us believe, and the circumstances were such that a cautionary instruction might have led the jury away from the truth rather than toward it.

(2) *Alleged errors concerning Roy's grand jury testimony.*

Defendant complains in regard to the Government's summation and the charge with respect to Roy's grand jury testimony. The complaints about the summation relate to statements that Roy "gave sworn testimony under oath to a Grand Jury that identified Bob Marchand as 'Big Foot' or Bob, the supplier" "he told the Grand Jury that this friend committed a felony; that this friend gave him 180 pounds of marijuana"; and he "told . . . the Grand Jury that Bob Marchand was 'Big Foot'." While Roy did not tell the grand jury in so many words that Bob Marchand was Bob or Big Foot, he did testify that the supplier was

> the Bob, also known as Big Foot (or *vice versa*), who was the same man he had known from Amherst, Mass., days, whom he remet in a Brattleboro bar with a girl named Ann and who had given him telephone numbers to call to purchase marijuana. Roy did in fact testify at trial, without objection, that he led the grand jury to think he could identify Marchand as the person who supplied him with the marijuana and that "this friend" was the man who supplied him with marijuana, which was indeed a felony. The motion for a mistrial was based not on any minor inaccuracies in the prosecutor's statements concerning the grand jury testimony but on the basis that the testimony could not be used as substantive evidence under Rule 801(d)(1)(A), a point which we reject below.

The charge was as follows:

> Now if you find that the witness Roy on that occasion before the Grand Jury, did identify the defendant Marchand along with his girl companion Ann Curtis as the same person as "Big Foot" whom he had previously seen with Ann Curtis, you may consider his testimony to the Grand Jury as substantive evidence of the facts as he represented them to be in his testimony to the Grand Jury and this is so, although the witness Roy has stated he misled the Grand Jury and was not entirely truthful to that body.
>
> It is for you the Jury to determine in the light of all the evidence in the case bearing on the question which testimony of Roy is true. His testimony at the trial, or his testimony before the Grand Jury in July of 1976.

The objection to this was:

> Mr. Weinberg: Our first objection, Your Honor, would be, . . the first objection, Your Honor, would be

to your allowing the Jury to use Mr. Roy's Grand Jury testimony substantively.

We would object both because there was no evidence of an I.D. of MARCHAND in the Grand Jury that came out through the evidence.

Secondly, there were no statements within Rule 801.

Third, because there couldn't have been any introduced because of the taint issue coming from the, your exclusion of the pre-trial photographic identification.

Moreover, I think Your Honor inadvertently invited the Jury to guess which is truthful by asking them to make that kind of decision.

I ask Your Honor to instruct the Jury they can't surmise, conjecture, or guess when Roy told the truth because there wasn't enough evidence to base that kind of judgment on.

The criticisms now made relate to the judge's characterization of Roy's grand jury testimony. These are that the only grand jury statements introduced before the trial jury referred simply to Ann and not to Ann Curtis and that nowhere in the grand jury testimony so introduced did Roy identify Marchand as Big Foot.

The Ann Curtis matter need not detain us. As previously stated, the Government had introduced portions of Roy's grand jury testimony in which he had referred to "Ann" as Big Foot's female associate. Roy admitted that the Ann he referred to before the grand jury was the same Ann who was Marchand's fiancée. The judge could reasonably conclude that Roy's subsequent testimony that he never in fact had seen the girl who was with Big Foot with Bob Marchand did not contradict his statement that the Ann he meant when he purportedly misled the grand jury was Marchand's financée. Further, if counsel had thought the reference to "Curtis" to be significant, it was his duty to

bring this error to the attention of the judge who would doubtless have corrected it, *United States* v. *Kahaner*, 317 F.2d 459, 478-79 (2 Cir.), *cert. denied*, 375 U.S. 836 (1963). Counsel could well have thought that doing so would only highlight the point.

With respect to the statement in regard to Marchand, we repeat what we have said about the summation. Grand jury testimony which was read to the jury did have the effect of identifying Marchand as Big Foot, as Roy seemed to recognize in his trial testimony. The judge could well have understood the objection to be that since the trial jury had not heard, and under his suppression ruling should not have heard, evidence of Roy's grand jury photographic identification, no use of Roy's grand jury testimony as substantive evidence was permissible. This simply was not so. Even if Roy's grand jury statements which were read to the trial jury were not admissible under Rule 801 (d)(1)(C), they were receivable under Rule 801(d)(1)(A). The flaw underlying much of appellant's argument is the inarticulate premise that identity can be proved only by corporeal or photographic *identification* after the crime. Manifestly this is not true, as in the case where the person originally observed as the perpetrator has significantly altered his appearance. In such a case and many others, *cf. United States* v. *Barbati*, 284 F. Supp. 409, 411 (E.D.N.Y. 1968), identity can be established by other evidence showing how the perpetrator had been known before the crime and then linking the defendant with him; if a witness has testified to such facts before a grand jury and forgets or denies them at trial, his grand jury testimony or any fair representation of it falls squarely within Rule 801(d)(1)(A).

In view of this discussion, little need be said in regard to appellant's further contention that the Government's eliciting from Roy that he had misled the grand jury was a

backhanded way of bringing before it the evidence of the photographic identification in violation of the judge's order and Marchand's d e process rights. The jury heard nothing about Roy's pl otographic identification, and the judge evidently did not consider his order to have been violated. The former point suffices to dispose of the constitutional claim as well.[24]

In a footnote to his reply brief Marchand seems to suggest that it was error to allow the Government to ask the questions about misleading the grand jury at all, since Rule 801(d)(1)(A) affords the only way to get inconsistent grand jury testimony of a witness before the trier of the facts. This misconceives the limited function of the Rule, namely, to withdraw the hearsay bar from material coming within it. The Rule does not prohibit the use of other material for impeachment, *see* Rule 613. All that the judge allowed to be considered "as substantice evidence" were portions of the grand jury testimony that were read to the trial jury.

IV. *Sufficiency of the evidence.*

Although, as indicated, fn. 3 *supra,* counsel for appellant argued sufficiency of the evidence as their initial point and

24 We have serious doubt whether the judge was correct in granting suppression on the ground of impermissible suggestiveness, not only in light of the Supreme Court's recent decision in *Manson* v. *Brathwaite, supra,* but even apart from it. Roy had made his first photographic identification, such as it was, without impermissible suggestion; the supplying of a better and later photograph of "a Bob" was to see whether this would strengthen recognition already made. The problem lay rather in whether there had in fact been an identification. Marchand's correct constitutional claim on the "backhanded" argument would thus be rather that he had no opportunity to show the trial jury how slender Roy's photographic identification had been, an opportunity of rather small value in light of Roy's admission to the grand jury that he had identified his supplier. However, since the jury never heard that there was a photographic identification, the issue does not arise.

included a great deal of discussion of rules of evidence in that argument, we have felt it necessary to deal first with their claims that much of the evidence was improperly received. Having held these to be without merit, we find the question of sufficiency relatively easy.

We start with the solid core of facts as to which there is no real dispute. Bob or Big Foot was the same man all along. He was Roy's friend at Amherst, Mass.; the renewed acquaintance at Brattleboro; the man with whom discussions about marijuana began at Springfield; the man who had a female associate identified before the grand jury as Ann; the man who engaged in two previous narcotics sales to Roy and Perkins; the man who gave Roy telephone numbers which Roy could call to purchase narcotics; and the man who sold the 180 pounds of marijuana on July 18. There were no Bob on the one hand and Big Foot on the other; the two were one and the same. Roy, Perkins or both made frequent calls just before the July 18 transaction to telephones listed in the names of Robert Marchand and Ann Curtis. Roy had meant to implicate Marchand before the grand jury, thought he had done so, and got word to Hillman.[25] Hillman informed Marchand, who made careful note, including Roy's address, *see* fn. 11, *supra,* and shortly departed for Florida. This would justify a reasonable juror in being convinced beyond a reasonable doubt that Robert Marchand was Bob-Big Foot even if there were nothing more.

But there was. Perkins' photographic identification was before the jury. To be sure, Perkins testified that he was asked to select the photograph that "most closely resembled" Bob or Big Foot, and the judge so found despite Agent Handoga's testimony that Perkins was asked to and

25 Since this evidence was brought out by the defense, it cannot and does not object on the ground of hearsay.

did make a positive identification;[26] and appellant relies in this connection on such photographic identification cases as *United States* v. *Keller*, 512 F.2d 182, 184 (3 Cir. 1975) ("a conviction cannot stand when it rests solely on an identification as uncertain as this one"), and *United States* v. *Johnson*, 427 F.2d 957, 961 (5 Cir. 1970) (where "sole witness is unsure and there are no other connecting or corroborating circumstances" the jury cannot find guilt beyond a reasonable doubt). But these cases dealt with identification by victims who had only scanty opportunity for observation and where there were no corroborating circumstances.[27] There were also Perkins' description and,

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26 The jury could reasonably have believed that the emphasis on the "closely resembles" selection was supplied by defense counsel and not by Perkins, and that Perkins picked out the man he thought was Marchand, not someone who resembled him. Perkins testified that he was aware that the task at hand in the photographic identification was to "find the two people I had seen on July 1975." In cross-examination concering the photographic identification, defense counsel handed Perkins a photograph and the following exchange occurred:

Q. What is it?

A. It was a photograph I picked *to be* the other person that had been with Big Foot.

Q. The person who *most resembled* the person who had been with Big Foot in July of 1975?

Q. Correct. (Emphasis supplied).

Belief by the jury that Perkins selected the man he thought to be Big Foot thus would not be inconsistent with the trial court's finding on the suppression motion that he was *asked* to make a "closely resembles" selection.

27 Defendant also cites a number of cases in which in-court testimony that the defendant resembled the perpetrator of the crime was held insufficient to sustain a conviction, but these are easily distinguishable. In *Hendrix* v. *United States*, 327 F.2d 971, 974 (5 Cir. 1964), the only evidence connecting the defendant with the cashing of forged checks was "testimony of a resemblance and the fact that the person sought to be identified was accompanying the persons who are more clearly tied in with the offense charged." In *Alexander* v. *United States*, 354 F.2d 59, 63-64 (5 Cir. 1965), the only positive identification of the defendant put him at the scene of the bank theft the day before it occurred. The only other admissible evidence was testimony of bank

most important, his sketch. As we have previously stated, the resemblances between this and the photograph which Perkins later identified are too strong for anyone to believe that Perkins could have drawn the sketch if he had never seen the subject. And Perkins was clear that he had seen the man he was drawing only in connection with the three narcotics transactions, never anywhere else. Despite what the jury could reasonably have deemed a charade about his inability to make a courtroom identification, there was Perkins' inadvertent admission on cross-examination by defense counsel about the sketch that the man standing before him in the courtroom was indeed the man he had tried to draw. Also quite probative was Perkins' selection, tentative though it was, from the scores of phone numbers listed in the toll records, of Marchand's number as the one at which Big Foot could be reached. Finally, there were the various changes of testimony by Roy and Perkins; far from the judge and the jury being bound to swallow the version most favorable to Marchand, they were free to believe, on the basis of self-contradiction and demeanor, that these witnesses were lying[28] when they weakened their earlier statements and that the former identifications and the grand jury testimony read into the record were the truth. Indeed Roy's brash demeanor comes through even on a cold record. Whatever merit the learned discussions by counsel might have on other facts, they have none here. As in *Achilles* v. *New England Tree Expert Co.*,

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employees that the defendant looked like someone who had been on the premises on the day when the theft occurred. *Id.* at 61. In both *United States* v. *Musquiz*, 445 F.2d 963, 965-66 (5 Cir. 1971), and *United States* v. *Luck*, 447 F.2d 1333 (6 Cir. 1971), the only admissible evidence connecting the defendant with the crime was uncertain identification testimony.

28 On one occasion when Roy explained his changed testimony on the basis that he was now testifying under a grant of immunity, the court warned him that the grant did not include perjury or false statements.

396 F.2d 72 (2 Cir. 1966) (Medina, *J.*), the verdict was a tribute to Vermont common sense.

We have carefully considered defendant's other claims of error but, except for the ones rejected in the margin,[29] find them unworthy of discussion.

The judgment of conviction is affirmed.

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29 Defendant's argument that the indictment should have been dismissed under *United States* v. *Estepa*, 471 F.2d 1132, 1137 (2 Cir. 1972), is meritless. We there held that dismissal would be required when there is a high probability that the grand jury would not have indicted if presented with first-hand testimony rather than hearsay, or where the prosecution misleads the grand jury as to the "shoddy merchandise they are getting." The complaints here are that instead of calling Perkins before the grand jury the prosecutor had Agent Handoga read Perkins' testimony before the first grand jury which included the statement that he had "found out [Big Foot's] name was Bob Marchand" but not what Perkins later claimed to be the rather weak photographic identification, and added Handoga's own observations with respect to Perkins and Roy's identifications. Perkins' testimony before the first grand jury was clearly hearsay with respect to the second grand jury under the circumstances, and we shall assume *arguendo* that the agent's also was, *cf.* 4 Weinstein and Berger, *supra*, at 801-137 to 140. Assuming that *Estepa* has survived *United States* v. *Calandra*, 414 U.S. 338, 344-45 (1974), as we seemingly did in *United States* v. *Bertolotti*, 529 F.2d 149, 159 (2 Cir. 1974), we do not find either branch of the test to have been met. There was no deception of the grand jury; *United States* v. *Harrington*, 490 F.2d 487, 489-90 (2 Cir. 1973); *United States* v. *Olsen*, 453 F.2d 612, 615 (2 Cir.), *cert. denied sub nom. Leach* v. *United States*, 406 U.S. 927 (1972), and there is not the slightest doubt that the grand jury would have indicted if Perkins had been called, as he should have been if available.

We likewise reject defendant's argument that the indictment should have been dismissed because it was based in part on Roy's photographic identification which was later ruled to be inadmissible at trial because of impermissible suggestiveness. Apart from our doubt as to the correctness of that ruling, *see* fns. 15, 24 *supra*, the Government, in presenting a case to the grand jury, cannot be expected, save perhaps in the most egregious cases of which this was not one, to anticipate later unfavorable suppression decisions. *See United States* v. *Calandra*, *supra*, 414 U.S. at 344-45.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1288—September Term, 1976.

(Petition for rehearing filed September 14, 1977 — Opinion denying petition for rehearing filed November 1, 1977.)

Docket No. 77-1131

UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT P. MARCHAND, JR.,

Appellant.

Before:

FRIENDLY, TIMBERS and MESKILL,

Circuit Judges.

PER CURIAM:

On Petition of Appellant for Rehearing

Appellant Marchand has filed a petition for rehearing, accompanied by a suggestion for rehearing *en banc*. This is limited to the portion of this court's opinion (Part IV, pp. 5405-12) affirming the district court's refusal to suppress the note seized on Marchand's arrest in Florida. We deny the petition.

The basis for our upholding the denial of the suppression motion was that the officers in Florida had probable cause to arrest Marchand which derived from a clearly

untainted source, primarily the photograph of Marchand previously sent them from Vermont, quite apart from the additional cause furnished by the unlawful extraction of a driver's license from Marchand's wallet.[1] Not seriously disputing that untainted probable cause existed, Marchand argues that the Government had the burden of showing that the arrest would have been made if the illegally obtained evidence had not existed and that it did not meet this.

The argument would transpose to the situation here presented a principle with respect to burden of proof laid down in the usual "fruit of the poisonous tree" case, *e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *United States* v. *Cole*, 463 F.2d 163, 171-74 (2 Cir.), *cert. denied*, 409 U.S. 942 (1972); *United States* v. *Falley*, 489 F.2d 33, 40-41 (2 Cir. 1973); and *United States* v. *Ceccolini*, 542 F.2d 136, 140-41 (2 Cir. 1977), *cert. granted*, 45 U.S.L.W. 3715, —— U.S. —— (1977), where the prosecution, having first obtained tainted evidence, must demonstrate that evidence thereafter developed did not stem from the evidence illegally obtained. Here the sequence was the opposite. When lawfully obtained evidence is sufficient to justify an arrest and an incidental seizure, a defendant suffers no violation of constitutional rights merely because an officer might not have made the arrest but for the additional proof furnished by evidence which he later obtained illegally. The Fourth Amendment protects against an arrest without probable cause derived from evidence legally obtained; it does not confer a further protection against the possibility that a particular officer might not have done what he lawfully could. *Cf. United States* v. *Capra*, 501 F.2d 267, 280

1 Although Marchand now avers that Massachusetts and New Hampshire drivers' licenses contained in his wallet at the time of his arrest contained photographs of him, he tendered no evidence of this at the suppression hearing.

n.12 (2 Cir. 1974), *cert. denied*, 420 U.S. 990 (1975). The Government thus had no such burden as defendant would place upon it. In the search warrant cases cited in our opinion, the courts did not require the Government to show that the warrant would in fact have issued, or even would have been sought, on the basis of the legally obtained evidence alone; it was enough, in Judge Leventhal's words, "[i]f the lawfully obtained information amounts to probable cause and *would have justified* issuance of the warrant, apart from the tainted information . . ." *James* v. *United States*, 418 F.2d 1150, 1152 (D.C. Cir. 1969) (emphasis supplied). *See also United States* v. *Koonce*, 485 F.2d 374, 379 (8 Cir. 1973) (if the affidavit of one officer, by itself, "*would be enough to support* a magistrate's finding of probable cause," the illegal search by another officer need not be considered (emphasis supplied)). We see no basis for the challenge by appellant's counsel to the analogy of these cases. The flaw is rather in invoking as an analogy cases where, but for the illegality, the untainted evidence justifying an arrest might not have been obtained at all.[2]

The petition for rehearing by the panel is denied.

2 Our *"but see"* citation to *United States* v. *Ceccolini*, *supra*, 542 F.2d 136, *see* slip opinion at 5408 n.19, does not, as counsel argues, indicate any view on our part that our decision was inconsistent with *Ceccolini*. It quite clearly indicates only that the evidence in *Ceccolini* dictated a different conclusion whether the Government had met its burden of showing that it would have discovered the untainted evidence without the tainted evidence than in the cases previously cited.

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Excerpt from Transcript of Suppression Hearing Testimony.

[79] THE COURT: Go ahead.

MISS JACOBSON: Thank you, Your Honor. We would call Special Agent James H. Harris.

James H. Harris, having been called as a witness by the Government, was duly sworn by the Clerk and testified on his oath as follows:

Direct Examination by Miss Jacobson:

Q. Agent HARRIS how are you employed? A. I am a Special Agent with the Drug Enforcement Administration in MIAMI, FLORIDA.

Q. And how long have you worked for the D.E.A.? A. Eight years.

Q. All right, were you on duty on August 24th, 1976? A. Yes, I was.

Q. All right, would you tell us what your hours of duty were that day, if you remember? A. Started at approximately 5:00 o'clock in the morning at the DADE COUNTY Public Safety Department in MIAMI BEACH, FLORIDA.

Q. Did you have occasion that day to execute a Federal arrest warrant? A. Yes, I did in LAUDERDALE, FLORIDA.

Q. All right, can you tell us when that warrant was issued if you know? A. I believe it was issued the day before, but I'm not exactly positive.

Q. All right, do you know if that warrant was issued resulting from an indictment that was returned by a Grand Jury? [80] A. Yes, it was a warrant as a result of an indictment.

Q. Do you know in whose name that warrant was issued? A. Robert HIGGINS.

Q. All right and would you tell us what happened at the time that you executed the warrant? A. We went to a

Mr. HIGGINS apartment in LAUDERDALE, FLORIDA, MYSELF, TWO DADE COUNTY Public Safety detectives and another Special Agent from the Drug Enforcement Administration. We were joined by a LAUDERDALE Police Department officer, myself, Detective ADCOCK and a LAUDERDALE Police warrant officer went to the front door, Agent McGlassius (Phonetic) and SATLER, Detective SATLER, went to the rear door of the apartment. The LAUDERDALE Police OFFICER, —

THE COURT: How do you spell that? Lauderale. A. L-A-U-D-E-R-H-I-L-L.

THE COURT: LAUDERHILL? A. Lauderhill.

THE COURT: Go ahead. A. The officer knocked on the door. This was a uniformed officer, knocked on the door and Mr. HIGGINS opened the door. The officer asked him if he was Mr. HIGGINS. He stated no and said he was Mr. HULL, I believe was the name, H-U-L-L. Detective ADCOCK identified to me Mr. HULL as being Mr. HIGGINS, the one that we had the arrest warrant for and I placed Mr. HIGGINS under arrest.

Q. And what happened at that point, did you enter the [81] apartment? A. Yes, I arrested him just inside the door of the apartment.

Q. All right and did you enter the apartment with the other law enforcement people with you? A. Yes.

Q. And was there anyone else present in that apartment? A. I was advised by Mr. HIGGINS that there was another person in the bedroom and I saw personally later identified, ROBERT MARCHAND coming from the bedroom on the, I believe it would be the southeast side of the apartment.

Q. And did you have any conversation with Mr. MARCHAND at that time? A. No, I asked one of the officers to find out who he was and to make sure that he was not armed.

Q. And one of the officers went over to Mr. MARCHAND to find that out? A. Yes.

Q. All right, were you notified at any time while you were in the apartment of Mr. MARCHAND's identity? A. Yes, I was in Mr. HIGGINS' bedroom, it's a two-bedroom apartment and Mr. HIGGINS' bedroom was on the southwest side of the apartment and we were in there talking to Mr. HIGGINS. Detective ADCOCK came over and stated that she knew ROBERT MARCHAND and she showed me I believe it was a driver's license and she stated that Mr. MARCHAND was known to her and that she had reason [82] to believe he was a fugitive from the District Court of Vermont on a marijuana conspiracy indictment and that she had learned this from conversation with the Special Agent HANDOGA of the Burlington District Office of D.E.A.

Q. And what did you do after Detective ADCOCK informed you of that? A. I placed a call to Special Agent HANDOGA in Burlington and advised him that we had personally identified ROBERT MARCHAND from the date of birth and other identifying information and was advised that there was a warrant in fact issued for MARCHAND and that I believe he, Agent HANDOGA also gave me the criminal indictment number and the date the indictment was filed and other information regarding his identity.

Q. Do you recall what that information was? A. I believe he just verified the date of birth and his height and weight and eye color and things like that and also he gave me the indictment number, the criminal indictment was 76-51 or something like that. I don't recall the exact number.

Q. And after he spoke with Agent HANDOGA, what did you do? A. I went back in the other room and it would be like the dining room, near the kitchen where Mr. MARCHAND was presently standing and advised him that he was

under arrest for violation of Federal narcotic laws and there was a warrant issued for him in VERMONT. I advised him [83] of his rights and I then searched him.

Q. And when you searched him, did you remove anything from his custody? A. Yes, I took a small telephone address book and various papers from his wallet.

Q. And were all these objects taken from Mr. MARCHAND's person? A. Yes.

Q. After you seized these objects, did you maintain them in your own custody? A. Yes.

Q. For how long? A. I believe it's possibly up to a week. I had, I sealed them in an evidence envelope and after conference with Agent HANDOGA I mailed them registered mail to Agent HANDOGA.

Q. Thank you, Agent Harris, I have no further questions.

Cross Examination by Mr. Weinberg:

Q. This arrest warrant that was Mr. HIGGINS, what was that for sir? A. Conspiracy to import marijuana and sale and distribution of marijuana.

Q. How did you know HIGGINS was inside the apartment? A. Knocked on the door and he opened the door.

Q. You went to that apartment for a specific reason, did you not? A. Yes, to arrest Mr. HIGGINS.

Q. The apartment was not registered in Mr. HIGGINS' name is it? [84] A. It was registered in an alias as Mr. HULL.

Q. The name was under Mr. HULL? A. I believe that's correct.

Q. Had you ever seen HIGGINS in the apartment before? A. I had never been in the apartment before.

Q. Had you even seen him go into the apartment complex before? A. No.

Q. Did you receive any specific information that he would be present at the apartment that day? A. Only

from the detectives, State Department of the Safety Department who had told me that they had conducted previous surveillance and investigation in the vicinity of the apartment and believed that he would be present early in the morning.

Q. Did they give you any specific details regarding whether or not they conducted a surveillance that evening? A. No.

Q. Had you ever heard Mr. HIGGINS go by the name of HULL before? A. I had never — up to that morning, I never heard of Mr. HIGGINS.

Q. Did your cooperating agents ever tell you the basis for their knowing that Mr. HIGGINS and Mr. HULL were the same? A. It was Detective ADCOCK, I believe, that I had the conversation with and I believe they determined from the investigation how, what means they used, I don't know.

Q. You don't know whether or not they interviewed the landlord or anything like that, do you? [85] A. No, I do know when he opened the door, he identified himself as Mr. HULL and we did have a picture of him and we knew he was HIGGINS.

Q. What time did you arrive? A. We were there approximately I guess, around 7:00 a.m. and we waited for about a half hour, for the LAUDERHILL uniformed police to arrive.

Q. You went inside the apartment complex and into the hall outside Mr. HULL's apartment at 7:30 a.m., approximately? A. About 7:30, that's approximate.

Q. You knocked on the door? A. The police officer did.

Q. Did he say anything? A. He advised him that he was of the Lauderhill police department and that he would like to talk to Mr. Higgins.

Q. Was this while the door was closed, or open? A. The door was closed.

Q. Before the door opened, he advised that he was a Lauderhill police officer? A. Yes, sir, I believe Mr. Higgins, I think it was Mr. Higgins, said, "who is it?" And he also announced himself again and Mr. Higgins then opened the door and asked him what's the problem and we arrested him.

Q. You arrested Mr. Higgins right at the threshold of the door, is that correct? A. Yes, just as we walked in.

Q. And did Mr. Higgins invite you in after that? [86] A. Yes.

Q. He invited you into the apartment? A. Well we had a little problem, the fact that he was wearing nothing but a towel at the time and he didn't really want to be taken down town in that condition.

Q. Did he go into his bedroom? A. Yes, he did.

Q. Which is the bedroom separate from that in which you noticed the second individual, is that correct? A. Yes, it's separate.

Q. When you saw the second individual you didn't know who he was, did you? A. I had no idea.

Q. Never seen him before in your life? A. No.

Q. Nor had Detective ADKINS, is that correct? A. Detective ADCOCK, I believe, had seen a photograph of Mr. MARCHAND somewhere in the past. I don't know when, and —

Q. It's fair to say you were the arresting officer, sir, is that correct? A. In what sense?

Q. You made the decision to arrest Mr. MARCHAND? A. Yes, I did.

Q. That decision was after you spoke to Special Agent HANDOGA in VERMONT, is that correct? A. After I determined he was wanted, yes, sir.

[87] Q. Right and you determined that after the phone call to Special Agent HANDOGA? A. And from a conversation with Detective ADCOCK.

Q. But it wasn't until after you spoke with Special Agent HANDOGA that you arrested ROBERT MARCHAND for being a fugitive from an indictment? A. I undertook upon myself to talk to one of our agents in VERMONT to determine the fact that there was a warrant issued.

Q. And then you arrested Mr. MARCHAND? A. Correct.

Q. Not beforehand? A. Correct.

Q. Did you and Mr. Marchand have any discussions prior to your placing him under arrest? A. I don't believe I ever talked to him.

Q. You were with Mr. HIGGINS, were you not? A. I was with Mr. HIGGINS.

Q. In, and Mr. HIGGINS was in the bedroom getting dressed? A. Yes, he was getting dressed in there, yes.

Q. And Mr. MARCHAND you had first seen in another bedroom, is that right? A. He was coming out of the bedroom and there was, I believe a hallway bathroom and the hall goes out into the kitchen.

Q. Now, while you were with Mr. HIGGINS, Detective ADCOCK, is that the right name? A. Yes.

[88] Q. Came to you with the wallet? A. I believe she had a, just a driver's license.

Q. Driver's license? And that was Robert Marchand's driver's license? A. Yes.

Q. And that's how she identified the individual who was with Mr. HIGGINS in the apartment that morning, is that correct? A. I don't know if she did it completely on the driver's license or, well, she stated she had seen a picture of this person before and she recognized the name and the picture and whatever and she knew it was Robert

MARCHAND, the one that Agent HANDOGA had referred to earlier.

Q. You were not present at the conversation, were you, between the, if there was any, between Detective ADCOCK and Mr. MARCHAND? A. I wasn't present when she was talking to him.

Q. Do you don't know how Mr. MARCHAND was identified by Detective ADCOCK, do you? A. I would assume from the driver's license that obviously had given the driver's license, or had been taken, one way or the other. I don't know which way. And was identical, was identified. That's the normal procedure to identify the persons any how.

Q. Then she came into you because you were the chief agent on the spot, you were the D.E.A. agent, is that right? A. That's correct.

[89] Q. And she gave you the information at her command and you verified it by calling up Special Agent HANDOGA, is that right? A. That's basically correct.

Q. And then you arrested him, Mr. MARCHAND? A. Correct.

Q. Before you arrested MARCHAND, strike that. There was no search warrant for the apartment, was there? A. No.

Q. Mr. MARCHAND never made any statements to you after his arrest, did he? A. The only statements he made, well, he asked me what it was about and I told him. I didn't know what it was about, other than it was an indictment in the District Court of Vermont. I didn't know anything about it. He asked me what was going to happen and I told him he was going to be taken down and he said, "fine" or whatever. He wanted to call a lawyer. He's allowed, he made numerous phone calls from Mr. HIGGINS' phone, after talking with Mr. HIGGINS about using the phone to, I believe, the lawyer.

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